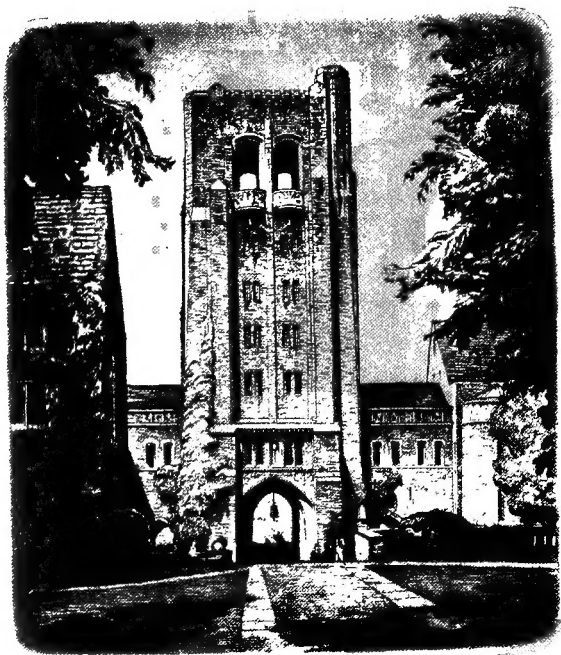


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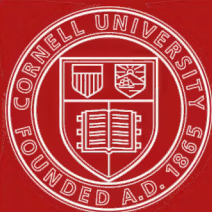
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J. H. McLean

COMMENTARIES

1869

ON

Buckworth July 1874

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

ENGLAND AND AMERICA.

By JOSEPH STORY, LL. D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,
AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

"Chancery is ordained to supply the Law, not to subvert the Law." — LORD BACON.

"His ergo ex partibus juris, quidquid aut ex ipsa re, aut ex simili, aut ex majore, minoreve, nasci videbitur, attendere, atque elicere, pertotando unamquamque partem juris, oportebit." — CIC. De Invent. Lib. 2, cap. 22.

NINTH EDITION.

CAREFULLY REVISED, WITH EXTENSIVE ADDITIONS,

By ISAAC F. REDFIELD, LL. D.

IN TWO VOLUMES.

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1866.

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Buckminster Bailey
1874
COMMENTARIES

ON

EQUITY JURISPRUDENCE.

CHAPTER XIX.

COMPENSATION AND DAMAGES.

[* § 794. Courts of equity do not commonly award damages.

§ 794 *a.* But will, for breach of duty in trustees and some other cases.

§ 795. Damages ascertained by reference to master, or jury.

§ 796 – 798. Will not award damages except as incidental to other relief, and when specific performance should be decreed.

§ 799. Other cases rest upon peculiar grounds, or involve fraud.

§ 799 *a.* Equitable damages awarded defendant as compensation.

§ 799 *b.* Equity will not award damages for useful improvements.]

§ 794. It is in cases of bills, brought for a specific performance, that questions principally (although not exclusively) arise, as to compensation and damages being awarded by courts of equity; and therefore it is convenient, in this place, to consider the nature and extent of the jurisdiction, exercised by courts of equity as to compensation and damages.¹ It may be stated, as a general proposition, that, for breaches of contract, and other wrongs and injuries, cognizable at law, courts of equity do not entertain jurisdiction to give redress by way of compensation or damages, where these constitute the sole objects of the bill. For, wherever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury than by the conscience of an equity judge.² And,

¹ The same principle of compensation and damages is applied in granting relief against penalties and forfeitures, as will be seen in a future page.

² Gilbert, For. Roman. ch. 12, p. 219; Clifford v. Brooke, 13 Ves. 130, 131 134; Blore v. Sutton, 3 Meriv. R. 247, 248; Newham v. May, 13 Price, 749, 752 Wiswall v. McGown, 2 Barb. 270; Shepard v. Sanford, 3 Barb. Ch. R. 127.

indeed, the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law. Compensation or damages (it should seem) ought, therefore, ordinarily to be decreed in equity only as incidental to other relief sought by the bill, and granted by the court;¹ or where there is no adequate remedy at law;² or, where some peculiar equity intervenes. Thus, for example, if, pending a suit for a specific performance of an agreement for a demise of quarries, a part of the subject-matter of the demise is abstracted, compensation may be obtained therefor by a supplemental bill.³

¹ Lord Chief Baron Alexander, in *Newham v. May* (13 Price, R. 752), said: "The cases of compensation, in equity, I consider to have grown out of the jurisdiction of courts of equity, as exercised in respect to contracts for the purchase of real property, where it is often ancillary, as incidentally necessary to effectuate decrees of specific performance." And he added: "It is not in every case of fraud that relief is to be administered in equity. In the cases, for instance, of a fraudulent warranty on the sale of a horse, or any fraud in the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity." *Ante*, § 779.

² *Newham v. May*, 13 Price, R. 732; *Ranelaugh v. Hayes*, 1 Vern. R. 189; *Ante*, § 711.

³ *Nelson v. Bridges*, 2 Beavan's R. 239. In this case, Lord Langdale said: "It has already been declared, that the plaintiff is entitled to a specific performance of the agreement; but, pending the proceedings, the very subject of the agreement, to which the plaintiff has by the decree been declared entitled, has been abstracted. The stone, or a quantity of the stone, which the plaintiff had obtained a license to quarry, has actually been taken away by the defendant Wordsworth; so that, while the performance of the agreement has been resisted and delayed by the defendants, they, or one of them at least, has taken away a portion of the very subject-matter of the suit, and the plaintiff has been thereby forever deprived of the full benefit of his contract. If that circumstance had been known at the first hearing, I cannot have the least doubt but that the court would, in the exercise of its jurisdiction, have put in a due course of investigation the question of the amount of compensation which ought to be made to the plaintiff. This matter, it appears, was not brought to the attention of the court at that time, and a supplemental bill is now filed by the plaintiff, for the purpose of obtaining compensation. It is said, that such compensation might originally have been had at law; or, if not, that at least it might have been obtained at law, by perfecting the decree for the specific performance of the agreement in some particular form. I am of opinion that it is not necessary for this court, when it has once entertained jurisdiction in a case, to resort to that circuitous mode of giving relief; I think, moreover, that if this matter had been before the court at the first hearing, it would have been put in a proper train of investigation. Under these circumstances, therefore, it appears to me that the plaintiff is now entitled to relief; but the form in which that relief is to be given is certainly a matter of very serious consideration. I think that the amount of what is due to the plaintiff ought to be ascer-

§ 794 *a.* So strictly has the rule been construed, that it has been thought that, even in cases where no remedy would exist at law, — as, for example, in cases where a trustee, by a breach of his trust, has injured the property, — a court of equity would not award damages therefor, although, if by reason of such breach of trust, the trustee had made profits, it would make him accountable therefor. But it certainly may admit of some question, whether, in a case of that character, where there would otherwise be an irreparable injury and wrong, a court of equity ought not to grant redress to the injured party, since at law there would be no remedy.¹

§ 795. The mode by which such compensation or damages are ascertained is either by a reference to a master, or by directing an issue, *quantum damnificatus*, which is tried by a jury. The latter used to be almost the invariable course in former times, in all cases where the compensation was not extremely clear, as to its

tained by means of an action at law; and I do not clearly see how it can be satisfactorily done in any other way. In this, and perhaps in all cases, the profit made by the defendants is not the measure of the damages done to the plaintiff; for we find that the quarry was not worked in a way to make the most of it. Mr. Bridges, thinking the validity of the license which he had given to Wordsworth to be doubtful, discouraged his working it, pending the proceedings; so that Wordsworth took only that stone which it was convenient for him to take, and he did not therefore work it in the profitable way in which the plaintiff would have worked it. It appears to me that the defendants are correct, when they say that this is a case of damages and not of account, because it is to recover something which cannot be ascertained by taking an account of the profits made, — it is to ascertain the amount of the loss which the plaintiff has sustained by being prevented doing that which it has been declared he was entitled to do. I think the proper mode of assessing the amount of the damage will be to require the defendants to admit such facts as are necessary, and to allow the plaintiff to bring an action to ascertain *quantum damnificatus*."

¹ The Corporation of Ludlow *v.* Greenhouse, 1 Bligh's (N. S.) R. 18, 57, 58. In this case, Lord Redesdale said: "Is there any case in which the Court of Chancery has awarded damages for a breach of trust? Lord Keeper Coventry was of opinion that he could not. In the case of a chapel of which I am trustee, Lord Coventry declared, that, where there was a gross breach of trust, all he could do was to make the persons who had committed it account for all the profits they had made, though the thing had received considerable damage." See *Pratt v. Law*, 9 Cranch, R. 456; *Post*, § 799. [* There can be no question that a trustee is liable, in a court of equity, to respond in damages for culpable negligence in the performance of his duty, whereby he failed to receive such profits upon the trust estate as he otherwise would have done. *Osgood v. Franklin*, 2 Johns. Ch. R. 1; *S. C.* 14 Johns. R. 527; *Willard's Eq. Jur.* 614; *Brightly, Eq. Jur.* 356.]

elements and amount; and this course is still commonly resorted to in all cases of a complicated nature. But the same inquiries may be had before a master; and, in cases where such inquiries do not involve much complexity of facts or amounts, this course is now often adopted.¹

§ 796. Wherever compensation or damages are incidental to other relief, as, for instance, where a specific performance is decreed upon the application of either party, with an allowance to be made for any deficiency as to the quantity, quality, or description of the property, or for any delay in performing the contract; there, it seems clear, that the jurisdiction properly attaches in equity; for it flows, and is inseparable from the proper relief.² So, where a bill is brought by the vendor against the vendee for a specific performance of the contract of sale, and for a payment of the purchase-money, if the decree is for a specific performance, equity will decree the payment of the purchase-money also, as incidental to the general relief, and to prevent a multiplicity of suits, although the vendor might in many cases have a good remedy at law for the purchase-money.³ So, where a contract for the sale of lands has been in part executed by a conveyance of a part of the lands by the vendor, but he is unable to convey the residue, equity will decree the repayment to the vendee of a proportionate part of the purchase-money with interest, if he has paid more than the part of the lands conveyed entitle the vendor to hold.⁴ But, where a specific performance is denied, there is somewhat more difficulty in establishing the propriety of exercising a general jurisdiction

¹ Gilb. For. Roman. 219; *Denton v. Stewart*, 1 Cox, R. 258; *Greenaway v. Adams*, 12 Ves. 401, 402; *Todd v. Gee*, 17 Ves. 278, 279; *Phillips v. Thompson*, 1 Johns. Ch. R. 150; *Pratt v. Law*, 9 Cranch, 493, 494; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 273, 285, 286; *Watt v. Grove*, 2 Sch. & Lefr. 513; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (b); 2 Fonbl. Eq. B. 5, ch. 1, § 5, note (s); *Woodcock v. Bennet*, 1 Cowen, R. 711.

² *Ante*, § 709, 711. See *Todd v. Gee*, 17 Ves. 278, 279; *Grant v. Munt*, Cooper, Eq. Rep. 173; *Ferson v. Sanger*, Davies, 260; *Newham v. May*, 13 Price, 752 (x); *Mortlock v. Buller*, 10 Ves. 306, 315; *Dyer v. Hargrave*, 10 Ves. 507; *Howland v. Norris*, 1 Cox, R. 61; *Halsey v. Grant*, 13 Ves. 77; *Forrest v. Elwes*, 4 Ves. 497; *Hedges v. Everard*, 1 Eq. Abr. 18, pl. 7; *Hepburn v. Auld*, 5 Cranch, 278.

³ See *Brown v. Haff*, 5 Paige, 235, 240; *Withey v. Cottle*, 1 Sim. & Stu. 174; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Cathcart v. Robinson*, 5 Peters, R. 269; *Ante*, § 711, 723, 772, 775, 790.

⁴ *Pratt v. Law*, 9 Cranch, R. 456.

for compensation or damages. It was strongly said by the Master of the Rolls,¹ on one occasion, where a specific performance was sought and refused, because the vendor had rendered himself incapable of performing the contract: "The party injured by the non-performance of a contract has the choice to resort, either to a court of law for damages, or to a court of equity for a specific performance. If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed; either way, I should have thought there was equally an end of its jurisdiction; for, in the one case, the court does not see reason to exercise the jurisdiction; in the other the court finds no room for the exercise of it. It seems that the consequence ought to be, that the party must seek his remedy at law." But, upon the footing of authority, he nevertheless proceeded to decree compensation in that case, by reference to a master.²

¹ Sir William Grant, in *Greenaway v. Adams*, 12 Ves, 401; *Ante*, § 711, 714, 723.

² *Ibid.*; *S. P. Denton v. Stewart*, 1 Cox, R. 258; 1 Fonbl. Eq. B. 1, ch. 1, § 8, note (z); *Id.* ch. 3, § 8, note (b); 2 Fonbl. Eq. B. 5, ch. 1, § 5, note (s); *Ante*, § 711, 714, 723. In *Sainsbury v. Jones*, 5 Mylne & Craig, R. 1, 3, Lord Cottenham said: "I certainly recollect the time at which there was a floating idea in the profession, that this court might award compensation for the injury sustained by the non-performance of a contract, in the event of the primary relief for a specific performance failing; and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long to recollect the time when the decision of Lord Kenyon in *Denton v. Stewart* (1 Cox, 258) had not been formally overruled; but at that time very little weight was attached to it, and very few instances occurred in which plaintiffs were advised to ask any such relief; and for a short time, Sir William Grant's decree in *Greenaway v. Adams* (12 Ves. 395) added something to the authority of *Denton v. Stewart*, although he threw out strong doubts as to the principle of that case. This, however, lasted but a short time, for *Greenaway v. Adams* occurring in 1806, Lord Eldon, in 1810, in *Todd v. Gee* (17 Ves. 273), expressly overruled *Denton v. Stewart*; and from that time there has not, I believe, been any doubt upon the subject. Certainly, during the thirty years which have elapsed since that time, I have never supposed the granting any such relief as being within the jurisdiction of this court. Indeed, before that case, Sir W. Grant, in 1807, in *Gwillim v. Stone*, 14 Ves. 128, refused to follow his own decision in *Greenaway v. Adams*, because the plaintiff did not ask a specific performance; that is, in a case precisely the same as the present; for, upon this appeal, the plaintiff does not ask a specific performance. Had it been supposed that this court had the jurisdiction contended for, every bill for a specific performance would have prayed compensation, in the event of the vendor proving not to have a good title. It is true, that, in this case, the compensation sought is not against the vendor, but against a per-

§ 797. There is much weight in the reasoning of the Master of the Rolls; and the only assignable ground upon which the jurisdiction can be maintained in such a case, is to prevent a multiplicity of suits. But that seems chiefly proper in cases where the court has already acquired a clear jurisdiction by a discovery for relief. In a later case, where a bill was framed for the delivery up of a contract, upon the ground of the defective title of the defendant, with a prayer that the compensation might be made, it was refused.¹ Indeed, Lord Eldon seems to have doubted the authority to decree compensation, and to have held the opinion that a court of equity ought not to give relief in the shape of damages, but only compensation out of the purchase-money, or, at least, that a court of equity ought not, except under very peculiar circumstances, upon a bill for specific performance, to direct an issue or a reference to a master, to ascertain damages, as it is a matter purely at law, and has no resemblance to compensation, strictly so called.² And his opinion seems to have been adopted on other recent occasions.³

§ 798. There is, however, a distinction upon this subject, which is entitled to consideration, and may, perhaps, reconcile the apparent diversity of judgment in some of the authorities. It is, that courts of equity ought not to entertain bills for compensation or damages, except as incidental to other relief,⁴ where the contract is of such a nature that an adequate remedy lies at law for such compensation or damages. But where no such remedy lies at

son who falsely assumed authority to sell; but this places the case still wider from the principle upon which this court exercises its jurisdiction in cases of contract; because, as against such agent, there is no case of contract, but a mere claim for compensation, for damages arisen from there being none which the purchaser can enforce. In *Woodcock v. Bennet* (1 Cowen, R. 711), the court held that where a party has put it out of his power to perform his contract specifically, the bill for a specific performance ought to be retained, and an equivalent in damages awarded, to be assessed, on reference to a master, or by a jury upon an issue of *quantum damnificatus*, as the circumstances may require. See, also, *Andrews v. Brown*, 3 Cush. 130.

¹ *Gwillim v. Stone*, 14 Ves. 129.

² *Todd v. Gee*, 17 Ves. 278, 279, 280.

³ *Clinan v. Cooke*, 1 Sch. & Lefr. 25; *Newham v. May*, 13 Price, R. 749; *Kempshall v. Stone*, 5 Johns. Ch. R. 194, 195; *Blore v. Sutton*, 3 Meriv. R. 248. But see *Woodcock v. Bennet* (1 Cowen, R. 711), cited *ante*, § 796, note.

⁴ This is said to be as far as courts of equity ought to go in awarding damages. See *Wiswall v. McGown*, 2 Barb. 270.

law, there a peculiar ground for the interference of courts of equity seems to exist, in order to prevent irreparable mischief, or to avoid a fraudulent advantage being taken of the injured party. Thus, where there has been a part-performance of a parol contract for the purchase of lands, and the vendor has since sold the same to a *bonâ fide* purchaser, for a valuable consideration, without notice; in such a case, inasmuch as a decree for a specific performance would be ineffectual, and the breach of the contract being by parol, would give no remedy at law for compensation or damages, there seems to be a just foundation for the exercise of equity jurisdiction.¹

§ 799. In the present state of the authorities, involving, as they certainly do, some conflict of opinion, it is not possible to affirm

¹ *Denton v. Stewart*, 1 Cox, R. 258; 1 Fonbl. Eq. B. 1, ch. 1, § 8, note (z); *Phillips v. Thompson*, 1 Johns. Ch. R. 149, 150, 151; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 273, 286; *Deane v. Izard*, 1 Vern. R. 159; *Hatch v. Cobb*, 4 Johns. Ch. R. 559, 560; *Kempshall v. Stone*, 5 Johns. Ch. R. 193, 195; *Todd v. Gee*, 17 Ves. 273. In a case cited from Lord Colchester's MSS. (— *v. White*, 3 Swanst. R. 109, note), and decided in the beginning of the last century, a specific performance was refused; but an issue of *quantum damnificatus* was awarded. In *Phillips v. Thompson* (1 Johns. Ch. R. 150), Mr. Chancellor Kent retained the bill, and awarded an issue of *quantum damnificatus*, founding himself upon the peculiar circumstances of the case before him, which he thought brought it within the reach of *Denton v. Stewart* (1 Cox, R. 258), and expressly affirming the jurisdiction (*S. P. Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 286). In another case, however (*Hatch v. Cobb*, 4 Johns. Ch. R. 560), the learned Chancellor seems to have doubted on that point, and said: "It is doubtful how far the court has jurisdiction to assess damages merely in such a case, in which the plaintiff was aware, when he filed the bill, that the contract could not be specifically performed or decreed. It was properly a matter of legal cognizance." And after citing the case in 1 Cox, R. 258, 12 Ves. 395, and 17 Ves. 273, he concluded by saying, "And, though equity in very special cases may possibly sustain a bill for a specific performance, it is clearly not the ordinary jurisdiction of the court." In a later case he expressed a still more decided opinion against the jurisdiction (*Kempshall v. Stone*, 5 Johns. Ch. R. 194, 195). But in *Woodcock v. Bennet* (1 Cowen, R. 711), the jurisdiction was expressly affirmed. *Andrews v. Brown*, 3 Cush. 130; *Ante*, § 796, note. The Supreme Court of the United States seem to have entertained no doubt, that, though a specific performance might not be decreed, an issue of *quantum damnificatus* would be within the competence of the court (*Pratt v. Law*, 9 Cranch, 492, 494). In *Cud v. Rutter* (1 P. Will. 570; Mr. Cox's note (3)), a specific performance was denied; and yet damages were decreed by way of compensation. See, also, *Forrest v. Elwes*, 4 Ves. 497. Lord Hardwicke, in *City of London v. Nash*, 3 Atk. 512, 517, refused a specific performance, but he awarded an issue of *quantum damnificatus*.

more than that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to a specific performance, or to some other relief. If it does attach in any other cases, it must be under very special circumstances, and upon peculiar equities, as, for instance, in cases of fraud, or in cases where the party has disabled himself, by matters *ex post facto*, from a specific performance,¹ or in cases where there is no adequate remedy at law.²

§ 799 *a*. The cases, however, which we have been thus far considering are cases where the party sought relief in equity as a plaintiff, and not where compensation was ordinarily sought by the defendant, in resistance or modification of the plaintiff's claim. In these latter cases, the maxim often prevails, that he who seeks equity shall do equity. Thus, for example, if a plaintiff in equity seeks the aid of the court to enforce his title against an innocent person, who has made improvements on land, supposing himself to be the absolute owner, that aid will be given to him only upon the terms that he shall make due compensation to such innocent person, to the extent of the benefits which will be received from those improvements. In such a case, if the plaintiff has fraudulently concealed his title, and has thereby misled the defendant, the title to this compensation is founded in the highest justice.³ But, independently of any such fraud, if the plaintiff seeks from an innocent person an account of the rents and profits of an estate, on which the latter has made improvements, without any notice of any defect of his title, a court of equity, in decreeing an account, will allow him to deduct or recoup therefrom a due compensation for his improvements.⁴ So, in cases of partition between tenants in common, compensation is often allowed in equity to one of the tenants in common, who has made valuable improvements thereon.⁵

¹ [This opinion of the learned author was expressly approved in the late case of *Andrews v. Brown*, 3 Cush. R. 135.]

² See *Cud v. Rutter*, 1 P. Will. 570, and Mr. Cox's note (3); *Greenaway v. Adams*, 12 Ves. 395; *Hedges v. Everard*, 1 Eq. Abr. 18, pl. 7; *Errington v. Aynesly*, 2 Bro. Ch. R. 341; *Deane v. Izard*, 1 Vern. 159; *Gwillim v. Stone*, 14 Ves. 129; *Todd v. Gee*, 17 Ves. 273.

³ *Ante*, § 385, 388, 389. See, also, § 655; *Post*, § 1237, 1238.

⁴ *Putnam v. Ritchie*, 6 Paige, R. 390, 405, 406; *Green v. Biddle*, 8 Wheat. R. 1.

⁵ *Ante*, § 655; *Coulter's case*, 5 Co. R. 30; *Green v. Biddle*, 8 Wheat. R. 1, 79 to 82; *Southall v. McKean*, 1 Wash. (Virg.) Rep. 434.

§ 799 b. It has been sometimes thought, as a matter of justice, that courts ought to go farther, and, in favor of a *bonâ fide* possessor of the land, whose title is defective, to decree compensation for the improvements made by him upon the land, in good faith, against the true owner, who asserts his title to it. The civil law seems to have adopted this broad doctrine, where the improvements were made by a *bonâ fide* possessor without notice of any adverse title. *Certe illud constat; si, in possessione constituto ædificatore, soli Dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor fuerit, qui ædificavit.*¹ And this also appears to be the rule of countries deriving their jurisprudence from the civil law.² But courts of equity seem not to have gone to this extent: but to have confined themselves simply to the administration of the equity, in cases where their aid has been invoked by the true owner in support of his equitable claims. They have never enforced, in a direct suit by the *bonâ fide* possessor, his claim to meliorations of the property, from which he has been evicted by the true owner.³

¹ Just. Inst. Lib. 2, tit. 1, § 30, 35; Dig. Lib. 6, tit. 1, l. 38, 48; Pothier, Pand. Lib. 6, tit. 1, n. 44; Post, § 1239; Bright v. Boyd, 1 Story, R. 478, 494, 495.

² Merlin, Repertoire; Amelioration; Id. Possession, § 5; Cod. Civ. de France, art. 555, 1381, 1634, 1635; 1 Domat, B. 3, tit. 1, § 5, art. 7; Id. tit. 7, § 3, art. 5, 6; Post, § 1239, and the authorities cited in Putnam v. Ritchie, 6 Paige, R. 403, 404.

³ Putnam v. Ritchie, 6 Paige, R. 390, 403, 404, 405. In this case, Mr. Chancellor Walworth said: "This principle of natural equity is constantly acted upon in this court, where the legal title is in one person, who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for relief. The court, in such cases, acts upon the principle that the party who comes here as a complainant, to ask equity, must himself be willing to do what is equitable. I have not, however, been able to find any case, either in this country or in England, wherein the Court of Chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle, in its application to future cases, might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this State for the purpose of giving the *bonâ fide* possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the

benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery in all such cases." *Post*, § 1237, 1238. On the other hand, Mr. Justice Story, in delivering the opinion of the court, in *Bright v. Boyd* (1 Story, R. 478, 494), said: "The other question, as to the right of the purchaser *bonâ fide*, and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the Digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores*. Dig. Lib. 50, tit. 17, l. 206. I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law, from a *bonâ fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate and thus to recoup them from the rents and profits. *Ante*, § 799 *a*, 799 *b*; *Post*, § 1237, 1238, 1239; *Green v. Biddle*, 8 Wheaton, R. 77, 78, 79, 80, 81. So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bonâ fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. *Ante*, § 799 *b*, and note; *Post*, § 1237, 1238. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. *Post*, § 1237, 1238. But it has been supposed that courts of equity do not, and ought not, to go farther, and to grant active relief in favor of such a *bonâ fide* possessor, making permanent meliorations and improvements, by sustaining a bill brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in *Putnam v. Ritchie* (6 Paige, R. 390, 403, 404, 405), entertained this opinion, admitting at the same time, that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess, that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such *bonâ fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bonâ fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete: is it reasonable or just, that, in such a case, the true owner should recover and possess the whole without any compensation whatever to the *bonâ fide* purchaser? To me it seems manifestly unjust

and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land by mere operation of law, and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But, then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest, that the claim of the *bonâ fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity. *Jure naturæ æquum est*. And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. *Certe* (say the Institutes) *illud constat; si, in possessione constituto ædificatore, soli Dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabricorum; posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui ædificavit. Nam scienti, alienum solum esse, potest objici culpa, quod ædificaverit temerè in eo solo, quod intelligebat alienum esse. Just. Inst. lib. 2, tit. 1, § 30, 32; Ante, § 799 b; Vin. Com. ad Inst. lib. 2, tit. 1, § 30, n. 3, 4, p. 194, 195.* It is a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice, on this subject, to a mere reduction from the amount of the rents and profits of the land. See *Green v. Biddle*, 8 Wheat. R. 79, 80. The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate (*quatenus pretiosior res facta est*), (*Dig. lib. 20, tit. 1, l. 29, § 2; Dig. lib. 6, tit. 1, l. 65; Id. l. 38; Pothier, Pand. lib. 6, tit. 1, n. 43, 44, 45, 46, 48*), and beyond what he has been reimbursed by the rents and profits. *Dig. lib. 6, tit. 1, l. 48.* The like principle has been adopted into the law of the modern nations, which have derived their jurisprudence from the Roman law; and it is especially recognized in France, and enforced by Pothier, with his accustomed strong sense of equity, and general justice, and urgent reasoning. *Pothier de la Propriété, n. 343 to 353; Code Civil of France, art. 552 to 555.* Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *malâ fide* possessor ought to have an allowance of all expenses which have enhanced the value of the estate, so far as the increased value exists. *Pothier de la Propriété, n. 350; Vinn. ad Inst. lib. 2, tit. 1, l. 30, n. 4, p. 195.* The law of Scotland has allowed the like recompense to *bonâ fide* possessors, making valuable and permanent improvements; and some of the jurists of that country have the benefit to *malâ fide* possessors to a limited extent. *Bell, Comm. on Law of Scotland, p. 139, § 538; Ersk. Inst. b. 3, tit. 1, § 11; 1 Stair, Inst. b. 1, tit. 8, § 6.* The law of Spain affords the like protection and recompense to *bonâ fide* possessors, as founded in natural justice and equity. *1 Mor. & Carl. Partid. b. 3, tit. 28, l. 41, p. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102.* Grotius, Puffendorf, and Rutherford, all affirm the same doctrine, as founded in the truest principles *ex æquo et bono*. *Grotius, b. 2, ch. 10, § 1, 2, 3; Puffend. Law of Nat. & Nat. b. 4, ch. 7, § 61; Rutherford, Inst. b. 1, ch. 9, § 4, p. 7.* There is still an-

other broad principle of the Roman law, which is applicable to the present case. It is that where a *bonâ fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him. Dig. lib. 6, tit. 1, l. 65; Pothier, Pand. lib. 6, tit. 1, l. 43; Pothier de la Propriété, n. 343." See, also, S. C. 2 Story, R. 605, where the doctrine was again affirmed, and acted upon by the court.

CHAPTER XX.

INTERPLEADER.

[* § 800. Interpleader in equity.

§ 801, 802. This proceeding existed at law, in cases of a joint bailment.

§ 803. And in cases of finding and some others.

§ 804, 805. This was only in actions of detinue and is now obsolete.

§ 806. The equitable remedy follows the analogy of that at law.

§ 807. Equity jurisdiction rests upon defect of legal remedy.

§ 808. It is enough if the party is exposed to conflicting claims.

§ 809. Plaintiff must make affidavit against collusion.

§ 810. Case where court ordered an account also.

§ 811. Cases of annuitants and tenants.

§ 812. Claims must be in privity with each other.

§ 813. But equity maintains more extensive jurisdiction than law.

§ 813 *a*. Liability to taxation in different towns.

§ 813 *b*, 813 *c*. Claims under policies of insurance, attachments, &c.

§ 814. Such bills brought by mere stake-holders.

§ 815 - 817. Independent titles cannot be settled by interpleader.

§ 817 *a*. The plaintiff may be an agent of one party.

§ 817 *b*. But in such case the other parties must claim under the title of his principal.

§ 818. Public agents may interplead independent claimants.

§ 819, 820. But a private holder cannot interplead independent titles.

§ 820 *a*. Case illustrative of the subject.

§ 820 *b*. As applicable to sheriff seizing goods.

§ 821. The bill must show two claims standing equal as to plaintiff.

§ 822. The case is disposed of in the court of equity.

§ 823. English statute on the subject.

§ 824. Bills in the nature of interpleader, more extensive remedy.]

§ 800. WE shall now examine the subject of INTERPLEADER. A learned author has treated this, and one other branch of equity jurisprudence (that of interference in cases of irreparable mischief and injury), as not strictly belonging either to the concurrent, or the exclusive, or the auxiliary jurisdiction of courts of

equity. Perhaps, in strictness, this may be correct, but it more nearly falls within the former than within either of the others.¹

§ 801. The remedy by interpleader was not unknown to the common law; but it had a very narrow range of purpose and application. The interpleader at law was where there was a joint bailment by both claimants.² It was a common practice, in the early times of the English law, for parties, by joint agreement, to deposit title-deeds, and other deeds and things, in the hands of third persons, to await the performance of covenants, or the doing of some other act, upon which they were to be redelivered to one or the other of the parties. It often happened, under such circumstances, that questions subsequently arose, whether the act had been properly performed, or the terms strictly complied with; and if, when either party supposed the crisis, on which the deed or thing was demandable, to have arrived, any dispute existed, as to the right, or as to the fact, an action of detinue (the appropriate action for such a case) became inevitable.³ Now, by the common law, in such a case, the depositary might, if such an action was brought against him, plead for his protection the fact of such delivery or bailment upon certain conditions; and his willingness to deliver the property to the party entitled to it, and his ignorance whether the condition were performed or not; and thereupon he might pray, that a process of garnishment (that is a process of monition or notice) might issue to compel the other depositor to appear and become a defendant in his stead. This was properly called the process of garnishment.⁴

§ 802. The process of interpleader was very nearly allied to that of garnishment; and it arose, when both of the parties, who concurred in a joint bailment, brought several actions of detinue against the depositary, under like circumstances for a redelivery of the thing deposited. The depositary might then plead the facts of the case, and pray that the plaintiffs in the several actions might interplead with each other. This was properly the process of interpleader.⁵ The proceeding seems highly reasonable in itself, to

¹ Cooper, Eq. Pl. Introd. p. 35.

² *Crawshay v. Thornton*, 2 Mylne & Craig, R. 1, 21.

³ 3 Reeves, Hist. of the English Law, ch. 23, p. 448 to 455.

⁴ Id. p. 448 to 450.

⁵ Id. p. 250 to 254; Mitford, Eq. Pl. by Jeremy, p. 141, 142; *Crawshay v. Thornton*, 2 Mylne & Craig, 1.

prevent the depositary from being harassed by suits in which he had no interest.

§ 803. The same process was also applied to cases where the thing in controversy came to the possession of the depositary by finding, and he was sued in detinue by different persons, each claiming to be the owner in severalty.¹ And it seems also to have been applied to cases of a bailment by A., to the depositary to re-bail to B. ; where both A. and B. sued the depositary in detinue.² But if there was no privity between the parties, but each plaintiff counted upon a several independent bailment against the depositary, there, it was said, the plaintiffs were not compellable to interplead, for it was the depositary's own folly, and he must abide by it.³

§ 804. The remedy, however, such as it was, was principally confined to actions of detinue, although it was applied to a few other cases, such as writs of *quare impedit*, and writs of right of ward. But it was not allowed in any personal action except detinue; and then only when it was founded either in privity of contract, or upon a finding.

§ 805. From this description of the process of interpleader at the common law, it is obvious that it could afford a very imperfect remedy in a great variety of cases. Indeed, as the action of detinue has, in modern times, fallen much into disuse, and the action of trover has been substituted in its stead (in which interpleader did not lie at the common law), little or no practical advantage could be derived from it in modern times.⁴ The only remedy, therefore, now resorted to, (as we are informed from very high authority,) for the relief of a person sued, or in danger of being sued, by several claimants of the same property, is that of filing a bill to compel them, by the authority of a court of equity, to interplead, either at law or in equity.⁵

¹ 3 Reeves, Hist. of the Eng. Law, ch. 23, p. 448 to 455 ; Mitf. Eq. Pl. by Jeremy, p. 141, 142.

² 3 Reeves, Hist. of the English Law, ch. 23, p. 448, 452.

³ 3 Reeves, Hist. of the English Law, ch. 23, p. 453, 454. See *Rich v. Aldred*, 6 Mod. 216 ; Story on Bailments, § 111, 112.

⁴ Cooper, Eq. Pl. 47, 48, 49 ; Mitf. Eq. Pl. by Jeremy, p. 48, and note H. ; Id. 141, 142.

⁵ The reader is referred to the able report of the common-law commissioners, made to Parliament, and printed by the order of the House of Commons, in March, 1830 (p. 24), for further information on this subject. Mr. Reeves has, in his His-

§ 806. It is observable, that the jurisdiction of courts of equity, to compel an interpleader, follows, to some extent, the analogies of the law.¹ It is properly applied to cases where two or more persons severally claim the same thing under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties.² He therefore

tory of the English Law (Vol. III. p. 448 to 455), brought together some of the cases of difficulty in the proceedings of interpleader at the common law. They abundantly show the inadequacy of the remedy. Mr. Eden's valuable Treatise on Injunctions contains a head of Interpleader, which I have consulted with great advantage, and have freely used. Eden on Injunct. p. 335 to 347.

¹ See *Metcalf v. Hervey*, 1 Ves. 249; *Mitford, Eq. Pl. by Jeremy*, 141, 142; *Cooper, Eq. Pl. Introd.* 35, 36. Lord Redesdale, in his *Treatise on Equity Pleadings* (edition by Jeremy, p. 141; 142), gives the following description of equity jurisdiction on this subject: "It has been mentioned," says he, "that where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him; and that the bill exhibited for this purpose is termed a bill of interpleader, the object of it being to compel the claimants to interplead, so that the court may adjudge to whom the property belongs, and the plaintiff may be indemnified. The principles upon which the courts of equity proceed in these cases are similar to those by which the courts of law are guided in the case of bailment; the courts of law compelling interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in certain cases only; as where the property has been bailed to the third person by both claimants, or by those under whom both make title; or where the property came to the hands of the third person by accident; and the courts of equity extending the remedy to all cases, to which, in conscience, it ought to extend, whether any suit has been commenced by any claimant, or only a claim made." In *Pearson v. Cardon*, 2 Russ. & Mylne, 613, Lord Brougham said: "In looking at the rules of interpleader at law, you discover the principles that govern this court; because I hold it to be strictly a concurrent jurisdiction, and that you can have no interpleader here, if, upon principle, you could not have it at law." It is not very clear, what is the precise extent to which this general remark was intended to reach. With reference to the case before his lordship, it was perfectly accurate. But there certainly are cases in which an interpleader will not lie at law, but in which, nevertheless, it will lie in equity. Indeed, if there be in the case a clear right of interpleader at law, that would seem to put an end to the jurisdiction in equity, which comes in aid of the party only when there is no remedy at law, or the remedy is inadequate."

² See *Bell v. Hunt*, 3 Barb. Ch. R. 391; *Strange v. Bell*, 11 Geo. 103.

applies to a court of equity to protect him, not only from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits, which are, or possibly may be, instituted against him.¹ [And, generally speaking, the bill should be filed before any judgment at law set-

¹ Mitf. Eq. Pl. by Jeremy, 48, 49; 1 Eq. Abr. 80, pl. 1, in marg.; *Atkinson v. Manks*, 1 Cowen, R. 691, 703; *Eden on Injunctions*, ch. 16, p. 335 to 343; *Moore v. Usher*, 7 Sim. 383; *Badeau v. Rogers*, 2 Paige, R. 209; *Mohawk and Hudson Railroad Co. v. Clute*, 4 Paige, R. 384, 392; *Richards v. Salter*, 6 Johns. Ch. R. 445. In *Glyn v. Duesbury* (11 Simons, R. 147), the Vice-Chancellor, Sir L. Shadwell, said: "In the case of *Crawshay v. Thornton*, the Lord Chancellor, speaking of the law of interpleader, uses this language: 'In equity, it is defined to be, where two or more persons claim the same debt or duty.' It is obvious, that there may be a case of interpleader, where no debt or duty is claimed. Lord Redesdale, in his Treatise on Pleading, twice asserts the proposition, that, where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought, of right, to render a debt or duty or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them; p. 48 (4th edition). And again, at p. 141, he says, that where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him. A case of interpleader then arises, where the same subject, whether debt, duty, or thing, is claimed. Now, when the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to identity of matter. But, where the subject in dispute is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they never can be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount however, may not be sufficient, of itself, to determine the identity; for the amount may be the same, and the debt may be different." See, also, *Sieveking v. Behrens*, 2 Mylne & Craig, 581. Lord Chief Baron Gilbert, in his *Forum Romanum* (p. 47), has supposed that a bill of interpleader bears a close resemblance to the process of intervention in the civil law. Mr. Eden, in his *Treatise on Injunctions* (p. 336, note (a)), has abundantly shown, that the processes are very different. The intervener, or *tertius interveniens*, in the civil law, files his process upon his own independent title, asserting a right to the thing in controversy against both of the parties, who are already contesting it, and insists upon his right to intervene or join in the discussion. On the contrary, a party who seeks an interpleader in law or equity, disclaims all title in himself; and requires other persons to engage in the controversy, and to exonerate him. The bill of interpleader in equity was doubtless borrowed from the process of interpleader at the common law. It might have been a far more useful jurisdiction, if it had gone to the full length of the intervention of the civil law. See *Merlin, Repertoire, Intervention*. See, also, *Gaill. Pract. Observ. Lib. 1, Obs. 69*, cited also by Mr. Eden.

ting the right of the respective parties to the property in question ; the object of the bill being to protect the complainant from the vexation attendant upon defending all the suits that may be instituted against him for the same property.¹ But a bill of interpleader may be filed after a verdict at law, if the effect of the action at law was merely to ascertain the damages due the plaintiff at law who was a defendant in the equity suit.²]

§ 807. The true origin of the jurisdiction is, that there either is no remedy at all at law, or the legal remedy is inadequate in the given case. If an interpleader at law will lie in the case, and it would be effectual for the protection of the party, then the jurisdiction in equity fails.³ So, if the party himself, seeking the aid of the court by bill of interpleader, claims an interest in the subject-matter, as well as the other parties, there is no foundation for the exercise of the jurisdiction ;⁴ for, in such a case, he has other appropriate remedies.⁵ [So, if the plaintiff has lent himself in any way to further the claims of either party to the fund in controversy, or to aid one in obtaining possession thereof, to the exclusion of the other, he can obtain no relief by this bill.⁶] And, besides, a bill of interpleader always supposes that the plaintiff is the mere holder of a stake, which is equally contested by the other parties, and as to which the plaintiff stands wholly indifferent between them ; so that when their respective rights are settled, nothing farther remains in controversy.⁷ But that can never be truly said to be the case, when the plaintiff asserts a personal right or claim, which remains to be settled between him and the other parties ; or the plaintiff seeks relief in the premises against either of them.⁸ The true ground upon which the plain-

¹ *Cornish v. Tanner*, 1 Younge & Jervis, 333 ; *Yarborough v. Thompson*, 3 Smedes & Marsh. 291 ; *Union Bank v. Kerr*, 2 Md. Ch. Dec. 460.

² *Hamilton v. Marks*, 19 Eng. Law & Eq. R. 321.

³ *Ibid.* and note (h) to Mitf. Eq. Pl. by Jeremy, p. 49.

⁴ [That the complainant would be benefited indirectly by the success of the parties to the bill of interpleader, is not an objection to the bill. *Oppenheim v. Wolf*, 3 Sand. Ch. R. 571.]

⁵ *Langston v. Boylston*, 2 Ves. Jr. 103, 109 ; *Angell v. Hadden*, 15 Ves. 244 ; *Mitchell v. Hayne*, 2 Sim. & Stu. 63 ; *Bedell v. Hoffman*, 2 Paige, Ch. R. 200 ; *Aldridge v. Thompson*, 2 Bro. Ch. R. 149 ; *Slingsby v. Boulton*, 1 Ves. & Beam. 334 ; *Atkinson v. Manks*, 1 Cowen, R. 691, 703.

⁶ *Marvin v. Ellwood*, 11 Paige, 365.

⁷ *Lincoln v. Rutland and Burlington R. R.* 24 Verm. 639.

⁸ *Mitchell v. Hayne*, 2 Simons & Stu. 63 ; *Moore v. Usher*, 7 Sim. R. 383 ; *Be-*
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tiff comes into equity, is, that, claiming no right in the subject-matter himself, he is, or may be, vexed by having two legal or other processes, in the names of different persons, going on against him at the same time. He comes, therefore, into court upon the most obvious equity, to insist that those persons, claiming that to which he makes no claim, should settle that contest among themselves, and not with him or at his expense and hazard.¹ If their respective titles are doubtful, there is so much the more reason why he should not be harassed by suits to ascertain and fix them; and, unless, under such circumstances, courts of equity afford him protection, he will, in almost every event, be a sufferer, however innocent and honorable his own conduct may have been.

§ 808. In regard to bills of interpleader, it is not necessary, to entitle the party to come into equity, that the titles of the claimants should be both purely legal. It is sufficient to found the jurisdiction that one title is legal and the other is equitable.² Indeed, where one of the claims is purely equitable, it seems indispensable to come into equity; for, in such a case, there can be no interpleader awarded at law.³ Thus, for instance, if a debt or other claim has been assigned, and a controversy arises between the assignor and the assignee respecting the title, a bill of interpleader may be brought by the debtor, to have the point settled, to whom he shall pay.⁴ Where the title of all the claimants is

dell *v.* Hoffman, 2 Paige, R. 199, 200; Badeau *v.* Rogers, 2 Paige, R. 209; Story on Equity Plead. § 291, 292. Hence it is said, that if, upon a sale by an auctioneer, a deposit is made by the purchaser, and the auctioneer is afterwards sued for the deposit by the purchaser, and he claims a right to deduct from the deposit his commission and the auction duty, a bill of interpleader will not lie by the auctioneer against the vendor and the purchaser, to ascertain their title to the deposit; because the auctioneer makes a personal claim to a part of the fund, and is, therefore, not indifferent between the parties; Mitchell *v.* Hayne, 2 Sim. & Stu. 63. But see Farebrother *v.* Prattent, Daniel, R. 64, 70; Fairbrother *v.* Nerot, Id. p. 68; note; *Post*, § 814, and note, as to the case of an auctioneer.

¹ Langston *v.* Boylston, 2 Ves. Jr. 109; Atkinson *v.* Manks, 1 Cowen, 703.

² Paris *v.* Gilham, Cooper, Eq. R. 56; Martinus *v.* Helmuth, Cooper, R. 245; S. C. Daniel, R. 68, note; 2 Ves. & Beam. 412 (2d edit.), note; Morgan *v.* Marsack, 2 Meriv. R. 107; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 348; Richards *v.* Salter, 6 Johns. Ch. R. 445; Smith *v.* Hammond, 6 Sim. R. 10; Crawford *v.* Fisher, 10 Sim. R. 479. See Hamilton *v.* Marks, 5 De Gex & Smale, 638; 19 Eng. Law & Eq. R. 321.

³ Duke of Bolton *v.* Williams, 4 Bro. Ch. 309; S. C. 2 Ves. Jr. 151, 152.

⁴ See Wright *v.* Ward, 4 Russ. 215; Lowndes *v.* Cornford, 18 Ves. 299. See Atkinson *v.* Manks, 1 Cowen, R. 691.

purely equitable, there is a still broader ground to entertain bills in the nature of a bill of interpleader; for courts of equity, in virtue of their general jurisdiction, may grant relief in such cases. Nor is it necessary that a suit shall have been actually commenced by either or both of the conflicting claimants, against the party, either at law or in equity. It is sufficient that a claim is made against him, and that he is in danger of being molested by conflicting rights.¹

§ 809. But, in every case of a bill of interpleader, the court, in order to prevent its being made the instrument of delay or of collusion with one of the parties, requires that an affidavit of the plaintiff should be made, that there is no collusion between him and any of the other parties;² and, also, if it is a case of money due by him, that he should bring the money into court; or, at least, should offer to do so by the bill.³

§ 810. A few cases, to illustrate these doctrines, may not be without use, to the more full understanding of their purport and effect. Thus, where A. received money of B., upon the terms, that if so much should appear, upon an adjustment of accounts, to be due to C., the same should be paid to the latter, and what was not due should be repaid to B., and A. gave a bond accordingly; there, B. having died before any adjustment of accounts, and the creditors of B. and C. having severally sued A. for the money, the court, on his bringing the money into court, decreed an account between the parties, and that the bond should be cancelled, and a perpetual injunction awarded to the proceedings at law.⁴ In this case, the court, as we perceive, went beyond the mere decree of an interpleader, and sustained the bill for an account, as well as for other relief, without sending the parties to law.

¹ *Langston v. Boylston*, 2 Ves. Jr. 107; 1 Eq. Abr. 80, I. in marg.; *Morgan v. Marsack*, 2 Meriv. R. 107; *Alnete v. Bettam*, Cary, R. 65, 66; *Angell v. Hadden*, 15 Ves. 244; S. C. 16 Ves. 202; *Farebrother v. Prattent*, 5 Price, R. 303; S. C. Daniel, R. 64, 70; *Fairbrother v. Nerot*, cited Daniel, R. 70, note; *Richards v. Salter*, 6 Johns. Ch. R. 445, 447; *Atkinson v. Manks*, 1 Cowen, R. 691.

² See *Williams v. Halbert*, 7 B. Monroe, 184.

³ 1 Madd. Ch. Pr. 142, 143; *Mitford*, Eq. Pl. by Jeremy, 49; *Id.* 143; *Metcalf v. Hervey*, 1 Ves. 248; *Dungey v. Angove*, 3 Bro. Ch. R. 36; *Langston v. Boylston*, 2 Ves. Jr. 109, 110; *Errington v. Attorney-General*, Bunbury, R. 303; *Stevenson v. Anderson*, 2 Ves. & B. 410; *Warrington v. Wheatstone*, Jac. R. 202; *Atkinson v. Manks*, 1 Cowen, R. 703, 704; *Williams v. Walker*, 2 Rich. Eq. R. 291; *Shaw v. Coster*, 8 Paige, R. 339.

⁴ *Hackett v. Webb*, Rep. Temp. Finch, 257, 258; Com. Dig. Chancery, 3 T.

§ 811. So, where there were several sets of annuitants, who had distrained for rents upon a tenant's farm, and he brought the rents into court, and prayed that the annuitants might interplead, it was decreed accordingly, and referred to a master to settle their priorities.¹ So, where there was an entire rent-charge which had been split into several parts by the owner, and there were different persons claiming the different parts; it was held, that the tenant might bring a bill of interpleader, to compel the parties to ascertain their shares respectively.² So, where the owner of an estate, upon which a rent-charge had been secured, filed a bill to compel the grantee, and the executors of a person, to whom it had been assigned, to interplead, a question having arisen, which of them was entitled to receive, the court sustained the jurisdiction.³ So, where a tenant was liable to pay rent, but there were several persons claiming title to it in privity of contract or tenure, he was held entitled to file a bill of interpleader to compel them to ascertain to whom it was properly payable.⁴

§ 812. And here it may be proper to state, that, in the cases of tenants seeking such relief, it must appear that the persons claiming the same rent, claim in privity of contract or tenure, as in the case of a mortgagor and mortgagee, or of trustee and *cestui que trust*; or, where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent.⁵ In cases of this sort, the tenant does not dispute the title of his landlord; but he affirms that title, and the tenure and contract, by which the rent is payable; and puts himself upon the mere uncertainty of the person to whom he is to pay the rent.⁶ But if a claim to the rent should be set up by a mere stranger, under a title paramount, and not in privity of contract or tenure, (as, if the stranger should bring ejectment against

¹ Aldridge v. Thompson, 2 Bro. Ch. R. 149, 150.

² Angell v. Hadden, 15 Ves. 244; S. C. 16 Ves. 203; 2 Meriv. R. 164. See, also, Paris v. Gilham, Coop. Eq. R. 35.

³ Duke of Bolton v. Williams, 4 Bro. Ch. R. 297, 430; S. C. 2 Ves. Jr. 138.

⁴ Dungey v. Angrove, 2 Ves. Jr. 310, 312; Metcalf v. Harvey, 1 Ves. 248; Hodges v. Smith, 1 Cox, R. 357; Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 383. See Stephens v. Callanan, 12 Price, R. 158; Jew v. Wood, 1 Craig & Phillips, R. 184.

⁵ Ibid.; Johnson v. Atkinson, 3 Anstr. 798; Coop. Eq. Pl. Introd. 35, 36; Crawshay v. Thompson, 7 Sim. R. 391; S. C. 2 Mylne & Craig, R. 1.

⁶ Whitewater Valley Canal Co. v. Comegys, 2 Carter, 469.

the tenant,¹) there, the tenant cannot compel his landlord to interplead with such stranger; for it is not a demand of the same nature, or in the same right. The stranger cannot demand the rent, as such, but he has, if successful in the ejectment, only a right to damages for use and occupation; whereas the landlord claims the rent, as such, in privity of contract, tenure, and title. The debt or duty is not the same; and interpleader lies only, when it is so, or in privity.² [Thus, if an administrator claims rent from a tenant by virtue of a parol lease from himself, and the heirs of the former owner claim compensation for use and occupation during the same time, as due them, a bill of interpleader will not lie, as there is no privity.³]

§ 813. These last cases may serve as proofs of the truth of the remark already made, that equity, in bills of interpleader, follows to some extent the analogies of the law; for we have seen that privity of contract is generally necessary to found a jurisdiction at law in cases of bailment upon a writ of interpleader. But in many other respects, the bill of interpleader in equity differs from that of law. In all the cases above mentioned, no interpleader would lie at law; for they involve no mutual or joint bailment, and no claim, founded upon a finding by the plaintiff.⁴

¹ Lord Hardwicke, in *Metcalf v. Harvey* (1 Ves. 249), said, that a bill of interpleader cannot lie as to the possession of an estate; but it must lie as to the payments of some demand of money. This might be true in the case then under consideration. But a bill of interpleader will also lie as well as to chattels as to money.

² *Ibid.*; *Woolaston v. Wright*, 3 Anstr. R. 801; *Smith v. Target*, 2 Anstr. R. 530; *Coop. Eq. Pl. ch. 1*, p. 48, 49. Lord Rosslyn, in *Dungey v. Angove*, 2 Ves. Jr. 310, has expounded this doctrine very satisfactorily. "The reason," says he, "is manifest; for, upon the definition of it, a bill of interpleader is, where two persons claim of a third the same debt, or the same duty. With regard to the relation of landlord and tenant, the right must be the object of an ejectment. The law has taken such anxious care to settle their rights, arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place. If the landlord does not defend for him, he recovers upon his lease a recompense against the landlord. In the case of another person, claiming against the title of his landlord, it is clear, unless he derives under the title of the landlord, he cannot claim the same debt. The rent due upon the demise is a different demand from that which some other person may have upon the occupation of the premises." See, also, *Crawshay v. Thornton*, 2 Mylne & Craig, 1, 20, 21, 22; *Stuart v. Welch*, 4 Mylne & Craig, 316, 317.

³ *Crane v. Burntrager*, 1 Carter, 165.

⁴ *Coop. Eq. Pl. ch. 1*, p. 47, 48.

§ 813 *a*. So, where a person is taxed in two different towns for the same property, when he is only liable to be taxed in one, and it is doubtful to which town the right to tax belongs, he may file a bill of interpleader to compel the tax-collectors, or towns, to settle the right between themselves, if there is no dispute about the amount of the tax which he is to pay.¹ But if the amount is in dispute, and he seeks relief in respect thereto, there the appropriate remedy is (as we shall presently see) a bill in the nature of a bill of interpleader.²

§ 813 *b*. So, where a loss had occurred under a policy of insurance, underwritten for a person who afterwards became insolvent, and assigned the policy, and there were various creditors, some of whom claimed on the ground of special liens, and others under the assignment, against the underwriters on the policy; it was held, that the latter might well be entitled to maintain a bill of interpleader, to compel the various creditors to ascertain and adjust their rights to the fund.³ So, where there was a fund in the hands of an agent of a party, who had become insolvent, and there were various attaching creditors, as well as the assignees of the insolvent, claiming title to the same fund, it was held, that a bill of interpleader would lie to ascertain and adjust their conflicting claims.⁴ [So, where A., a judgment creditor, assigned all his interest in the debt to B., subject to a lien of C., notice of which lien and also of the assignment was given to the judgment debtor, and A. the judgment creditor became insolvent after the assignment, and the assignee in insolvency gave notice to the judgment debtor that the estate of A. was vested in him, it was held that the judgment debtor might have a bill of interpleader to settle the rights of all parties in the fund.⁵]

§ 813 *c*. So, where an insurance was procured to be made by a broker upon a ship, at the request of a part-owner, who was also the ship's husband, and a loss occurred under the insurance, the amount of which was received by the broker; and the ship's husband afterwards required payment of all the loss to be made to him

¹ Thomson v. Ebbets, Hopkins, R. 272; Mohawk and Hudson Railroad Company v. Clute, 4 Paige, R. 384, 391.

² Ibid.; Post, § 824.

³ Spring v. South Car. Insur. Co. 8 Wheat. R. 268. See, also, Paris v. Gilham, Cooper, Eq. R. 56.

⁴ Sieveking v. Behrens, 2 Mylne & Craig, R. 581, 591, 592.

⁵ Jones v. Thomas, 23 Eng. Law & Eq. R. 475.

by the broker, and the other part-owners resisted his right to receive such payment; it was held to be a clear case for a bill of interpleader to be brought by the broker against all the part-owners.¹

§ 814. What the true limit of the jurisdiction upon bills of interpleader is, in cases where different persons claim the same specific chattel or thing from a third person upon the ground of title as owners, is not a matter, perhaps, settled by the authorities in a very precise manner.² In general, bills of this sort are brought by persons standing in the situation of mere stake-holders, such as auctioneers, agents, factors, and consignees, between whom and the different claimants there is a privity of contract or duty.³ In one case, where a banker with whom public stock was deposited for safe custody by the owner, afterwards refused to deliver it up to the owner, who was sued and imprisoned, under actions brought against him as a dormant partner in an insolvent mercantile house, and the banker was served with attachments by the plaintiffs in those actions, and also was held to bail in an action of trover by the owner, it was held to be a clear case for a bill of interpleader. In this case, however, all the parties claimed in privity under the same owner.⁴ There does not seem any difficulty, upon principle, in maintaining that a bill of interpleader may be brought by a stake-holder against three persons, each claiming in

¹ *Stuart v. Welch*, 4 Mylne & Craig, 316, 317, 319, 320, and note.

² Where, upon a bill of interpleader, there is a priority in the different titles, not incompatible with each other, so that it is apparent on the bill or answers, in what order they are to be paid, there is no ground to require an interpleader. *Bowyer v. Pritchard*, 11 Price, R. 115. Mr. Baron Wood in the same case, said, "I certainly cannot say that I am very conversant with the doctrine of interpleader, as entertained in courts of equity." The meagre state of the materials to be found in the reports leads to the conclusion that the doctrine on this whole subject is not well defined. And I cannot but regret that it is not in my power to give a more full and clear exposition of it.

³ See *Martinius v. Helmuth*, Cooper, R. 245; *S. C. Daniel*, Rep. 68, note; 2 Ves. & B. 412; *Stevenson v. Anderson*, 2 Ves. & B. 407, note (2d edit.); *Birch v. Corbin*, 1 Cox, R. 144, 145; *Edensor v. Roberts*, 2 Cox, R. 280; *Dowson v. Hardcastle*, 2 Cox, R. 258; *Pearson v. Cardon*, 4 Sim. R. 218; *Farebrother v. Prattent*, Daniel, R. 64, 70; *Fairbrother v. Nerot*, Id. 70, note. These latter cases do not seem in all respects entirely reconcilable with that of *Pearson v. Cardon*, 4 Sim. R. 218. See *ante*, § 807, note; *Fenn v. Edmonds*, 5 Hare, R. 314. [* And see *Desborough v. Harris*, 5 De G. M. & G. 439, where the case of *Fenn v. Edmonds* is overruled.]

⁴ By Lord Rosslyn, in *Langston v. Boylston*, 2 Ves. Jr. 106, 107, 109. But see *Fuller v. Gibson*, 2 Cox, R. 24.

a distinct and different right, the same property, as well as against two persons claiming in the same manner.¹

§ 815. In another and later case, where a bill of interpleader was brought by the master of a ship against the consignee under a bill of lading, and also against a person who insisted that the master ought not to deliver the goods under the bill of lading, because the consignor had acted with fraud towards him, in making the consignment, it was doubted whether the bill would lie. On that occasion, it was said that, although a master might file a bill of interpleader, where parties claimed adversely at law or in equity under the bill of lading, yet it might be doubted whether the bill would lie, where the adverse claims were not under the bill of lading, but paramount to it. Delivery according to the bill of lading would fully justify the master; and those who alleged an equity, paramount to the bill of lading, and against the consignor, should assert it by a bill of their own.² But, in a still later case, on further consideration, it was decided by the same court that the master might file such a bill, although the adverse claims were paramount to the bill of lading; as the right of possession in chattels may be in one person, and the right of property in another. In this case, also, it is to be remarked, that the bill does not seem to have been founded upon any legal adverse titles, wholly independent of each other, and not derived from a common source.³

§ 816. But let us suppose that two persons should claim the same property under independent titles, not derived from the same common source; the question would then arise whether a third person, *bonâ fide* and lawfully in possession of the property, as the agent, consignee, or bailee of one of the parties, could maintain a bill of interpleader against the different claimants, standing in privity with one only of them. It would seem that he could not; and that the analogies of the law and the doctrines of courts of equity equally prohibit it.⁴

§ 817. In the case here stated, the property is supposed to be lawfully in the hands of an agent of one of the claimants. Now,

¹ Hoggart v. Cutts, 1 Craig & Phillips, R. 197.

² Sir John Leach, in Lowe v. Richardson, 3 Madd. R. 277.

³ Morley v. Thompson, 3 Madd. Ch. R. Index, *Interpleader*, p. 564; Eden on Injunctions, p. 339, 340. See also Dawson v. Hardcastle, 2 Cox, R. 278.

⁴ See Abbott on Shipp. Pt. 3, ch. 9, § 24, 25; Cooper v. De Tastet, 1 Tamlyn, R. 177; Marvin v. Ellwood, 11 Paige, 365; Atkinson v. Manks, 1 Cowen, R. 691, 703 to 706.

the settled rule of law in such a case is, that an agent shall not be allowed to dispute the title of his principal to property which he has received from or for his principal; or to say that he will hold it for the benefit of a stranger.¹ And this doctrine seems equally true in equity also; for it has been held that property put into the hands of an agent by his principal, under a bailment, is not the subject of an interpleader, upon the assertion of a claim to it by a third person against the agent; but the latter must deliver it to the principal, as his possession is the possession of the principal.² The like doctrine would prevail in favor of a third person, to whom the principal, after the bailment, had transferred the right to the property in the possession of the agent, where the transfer had been recognized and assented to by the agent. For, in such a case, the third person, by such transfer and assent, would, in respect to the agent, be treated as the principal.³ Upon the same ground, it has been held, that, where one person receives money for another, as his agent, and the money is claimed by a third person, who gives notice of his claim, a bill of interpleader will not lie; for a mere agent to receive money for the use of another cannot, by notice, be converted into an implied trustee. His possession is the possession of his principal.⁴

§ 817 *a.* But this doctrine is to be taken with its proper qualifications. For, if the principal has created an interest or a lien on the funds in the hands of the agent, in favor of a third person, and the nature and extent of that interest or lien is in controversy between the principal and such third person, there the agent may, for his own protection, file a bill of interpleader to compel them to litigate and adjust their respective titles to the fund.⁵ So, if an

¹ *Dixon v. Hamond*, 2 B. & Ald. 313, 314; *Story on Agency*, § 217; *Cooper v. De Tastet*, 1 Tamlyn, R. 177; *Nickolson v. Knowles*, 5 Madd. R. 47; *Smith v. Hammond*, 6 Sim. R. 10; *Pearson v. Cardon*, 2 Russ. & Mylne, 606, 609, 610, 612; *Crawshay v. Thornton*, 7 Sim. R. 391; S. C. 2 Mylne & Craig, 1.

² *Cooper v. De Tastet*, 1 Tamlyn, R. 177, 181, 182. But see *Pearson v. Cardon*, 4 Sim. R. 218; S. C. 2 Russ. & Mylne, R. 606, 609; *Crawshay v. Thornton*, 7 Sim. R. 391; S. C. 2 Mylne & Craig, 1; [**Roberts v. Bell*, 7 El. & Bl. 323.]

³ *Crawshay v. Thornton*, 7 Sim. R. 391; S. C. 2 Mylne & Craig, 1, 22, 23, 24; *Atkinson v. Manks*, 1 Cowen, R. 691, 692; *Pearson v. Cardon*, 4 Sim. R. 218; S. C. 2 Russ. & Mylne, 606.

⁴ *Nickolson v. Knowles*, 5 Madd. Rep. 47; *Dixon v. Hamond*, 2 B. & Ald. 313. See *Atkinson v. Manks*, 1 Cowen, R. 691; *Smith v. Hammond*, 6 Sim. R. 16.

⁵ *Smith v. Hammond*, 6 Sim. R. 10; *Wright v. Ward*, 4 Russell, R. 215, 220; *Crawshay v. Thornton*, 7 Sim. R. 391; S. C. 2 Mylne & Craig, 1, 21; *Crawford*

agent has possession of a fund, and an equitable assignment or arrangement has been made between the party entitled to the fund, and a third person, and a controversy subsequently arises between them respecting it, the same rule will apply.¹ [So, where an attorney received notes of a corporation for collection, and held in his hands the money collected thereon, and different persons claimed the funds, some entirely as assignees of the corporation, and others in part by virtue of an order from one of the very assignees themselves, the attorney was allowed to file a bill of interpleader; inasmuch as he did not deny the right of his principal, the corporation, but merely alleged that different persons claimed the fund, not by title paramount to the principal, but derivative from the same common source. The rule that an agent cannot deny the title of his principal does not apply to such a case.²]

§ 817 *b*. The true ground, upon which this doctrine stands, that no bill of interpleader lies in cases of landlord and tenant, and principal and agent, lies somewhat deeper than might be inferred from the mere state of the doctrine; and it is not so much to be considered as an independent rule, as a necessary consequence of all interpleading. It is essentially founded in privity of rights or contracts between the parties. In the cases of landlord and tenant, and principal and agent, rights and liabilities exist between

v. Fisher, 1 Hare's R. 436, 440. In this case, Mr. Vice-Chancellor Wigram said: "The first question is, whether the subjects of these suits are, upon the pleadings, proper subjects of interpleader; and I am of opinion that they are so. I admit, that where a warehouseman, or other depositary of property, receives such property as bailee for another, and nothing is afterwards done by the party making the deposit, before he claims to have the property restored to him, the possession of the depositary must, in many cases, and for many purposes, be considered as the possession of the party making the deposit. The relation of the parties in such circumstances may often be analogous to that of landlord and tenant, in which the latter might be precluded from disputing the title of the former, in whomsoever the legal or equitable ownership of the lands in question may really be. This is explained by Lord Cottenham, in *Crawshay v. Thornton* (2 Mylne & Craig, 1), to which it is sufficient to refer. But the case assumes a widely different aspect, where, after the deposit is made, the party making it has, by an act of his own, transferred his interest in the subject of the deposit to another. It is clear that, in such a case, the bailee may compel the depositor to interplead with the party to whom, by the act of the depositor, the property in the goods has been transferred."

¹ *Wright v. Ward*, 4 Russ. R. 215, 220.

² *Gibson v. Goldthwaite*, 7 Ala. 282.

the parties, independent of the title to the property, or the debt or duty in question, and which may not depend upon the question of title.¹ Hence it is, that if an agent or bailee receive goods from A., who directs a delivery thereof to B., and, upon the application of B., the bailee agrees to hold them at the disposal of B., the bailee cannot afterwards, if a third person claims the goods under another title, file a bill of interpleader against B. and such third person, because of the want of privity, and his own obligations contracted with B.²

§ 818. A distinction has also been taken upon this subject between the case of a mere private agent or bailee, and that of a public agent or bailee. Thus, for instance, if a private warehouseman should receive goods, as agent of the principal, it is said that he must account solely to the latter for them. But, if the goods are deposited in a public bonded warehouse, the warehouseman is treated as a public agent, holding the same for the person who is entitled to the goods. The ground for the distinction (if it is at all maintainable) would seem to be the policy of protecting public agents, in the discharge of their duty, from the burdens of suits in which they have no interest, and have undertaken no private trust; and also the propriety of treating them, as they

¹ *Crawshay v. Thornton*, 7 Sim. R. 391; *S. C.* 2 Mylne & Craig, 1. In this last case, Lord Cottenham said: "The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; because, if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is of course, if the case be a proper subject for interpleader, would deprive a defendant having such a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant; in which case, the injunction would deprive him of a legal right, without affording him any equivalent or compensation. Such a case, undoubtedly, would not be a case for interpleader. A party may be induced, by the misrepresentation of the apparent owner of property, to enter into personal obligations with respect to it, from which he may be entitled to be released by a court of equity; but such a case could not be a subject for interpleader between the real and pretended owners. In such a case, the plaintiff would be asserting an equity for relief from a personal contract against one of the defendants, with which the other would have nothing to do."

² *Ibid.*

in reality are, merely as public depositaries or stake-holders, and not in any just sense as mere agents of the parties interested.¹

§ 819. Another case may be put, where a person is in possession of property, as bailee, to which the bailor himself has no possessory title; but he is a mere tortious possessor; and the rightful owner demands it of the bailee. In such a case, the question may arise, whether he can compel the bailor and the rightful owner to interplead with each other. Upon principle, it would seem that he cannot; for not only is there no privity between him and the rightful owner, but he is himself liable to be deemed a wrongful possessor, if he should, after notice, withhold the property from the rightful owner.²

§ 820. The true doctrine, supported by the authorities, would seem to be, that, in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person, who calls for an interpleader.³ Whether it might not have been more wise,

¹ *Cooper v. De Tastet*, 1 Tamlyn, R. 171, 181. Lord Brougham, in commenting on the case of *Cooper v. De Tastet*, in *Pearson v. Cardon* (2 Russ. & Mylne, 606, 609), said: "And now, entirely adopting the doctrine of that case before the Master of the Rolls, though the report must be incorrect, or that learned judge has not in his judgment expressed himself with his usual very remarkable accuracy; for, doubtless, he there meant to point to the distinction between a party who was, and a party who was not, agent,—to the distinction between an agent and a mere stake-holder,—and not to the distinction between a public and a private agent; I have no hesitation in stating it to be clear law, that an agent cannot, as an agent, if there be nothing to distinguish his situation from the common case, have a bill of interpleader against his principal." Lord Cottenham, in *Crawshay v. Thornton*, 2 M. & Craig, 1, 22, seems to have doubted the soundness of the distinction.

² See *Taylor v. Plumer*, 3 M. & Selw. 562; *Shaw v. Coster*, 8 Paige, R. 339.

³ It is difficult to understand what was the particular ground upon which the Vice-Chancellor held the case of *Mason v. Hamilton*, 5 Sim. R. 19, to be a plain case of interpleader. The wharfinger there was clearly a bailee of Livermore, and afterwards of Hamilton, to whom Livermore transferred the goods. But it does not appear what was the title of Emmerson, Price, & Co., to the goods; whether it was in privity with Livermore, or by a paramount and adverse title. And yet this might have been most material to the question, whether it was a case for an interpleader or not. This case has, since the former edition of this work, been commented on by Lord Cottenham, in *Crawshay v. Thornton* (2 M. & Craig, 1, 23), who treated it as no longer an authority upon the point of interpleader,

and more consistent with the principles of equity, originally to have held, that in all cases whatsoever, where the bailee was innocent and without any fault, he should have a right to a bill of interpleader, is a point into which it is now too late to inquire.

[* § 820 a. Where money was deposited with the plaintiffs, on interest, by one who stated, at the time of the deposit, that it was not his money, and subsequently the plaintiffs were led to believe that the money was part of the produce of a robbery committed on a railway company, and instituted a suit against the depositor; and a brother of the felon who claimed under an assignment of all the estate of the felon; and the railway company; and the crown: all of whom, it was alleged in the bill, claimed the money of the plaintiffs: it was held that the suit was properly instituted, and that such of the parties, as did not disclaim all title to the money, must interplead; and gave directions accordingly, as to

not only upon its own circumstances, but also upon the subsequent deliberate opinion of the Vice-Chancellor himself, in another case, that of *Crawshay v. Thornton* (7 Sim. R. 391). The case of *Pearson v. Cardon* (4 Sim. R. 218), before the Vice-Chancellor, also contains some language not unattended with difficulty. That was a case where the plaintiffs, who were warehousemen, and with whom A. & Co. (of which firm B. was a partner) had deposited some bags of wool, which were the goods in question. A. & Co. afterwards gave an order to the plaintiffs to transfer the goods to the name of B., and to be at his disposal, reserving the privilege of drawing samples from the wool in these bags. The plaintiffs accordingly transferred them in their books to B.; and then C. claiming them as owner, and as having put them into the hands of A. & Co., as his agents, gave notice of his title thereto, and denied the title of B., and offered an indemnity against B.'s title. The plaintiffs brought a bill of interpleader; and it was held by the Vice-Chancellor that the bill was maintainable, admitting the plaintiffs to be the agents of A. & Co.; for here there was a claim made by C. under a paramount title. This language would seem to intimate that an agent might maintain a bill of interpleader against his principal, and a third person claiming by a paramount title. When the same case came before the Lord Chancellor (Lord Brougham), he affirmed the decree upon the special ground of the reservation as to the samples (2 Russ. & Mylne, 606). But he expressly held, as we have seen (*ante*, § 818, note), that an agent, as such, could not maintain a bill of interpleader upon the ground of a claim by a stranger under a paramount title. In the case of *Crawshay v. Thornton* (2 Mylne & Craig, 1, 23), in which the decision of the Vice-Chancellor in *Pearson v. Cardon* was cited, Lord Cottenham said, that there must be some mistake in the report; for interpleader, as between agent and principal, was admissible only where the claim was under a derivative, and not under an adverse title. *Ibid.* p. 23. The cases of *Pearson v. Cardon*, 2 Russ. & Mylne, 606, 609, 610, and *Crawshay v. Thornton*, 2 Mylne & Craig, 1, 22, 23, 24, have now settled the doctrine precisely as it is laid down in the text.

what inquiries should be answered.¹ But it has been held that a tenant is not entitled to maintain a bill of interpleader against his landlord except where, by some act of the landlord subsequent to the lease, a demand is made upon the tenant growing out of these subsequent transactions.²

§ 820 *b*. It is not an invariable rule to allow a sheriff, who has seized goods, to file a bill of interpleader to settle the conflicting claims; and it will not be allowed in any case, except upon notice to the party under whom he acts, in order to give such party an opportunity to withdraw his claim.³]

§ 821. A bill of interpleader cannot be maintained by any person who does not admit a title in two claimants, and does not also show two claimants in existence capable of interpleading.⁴ Thus, a sheriff, who seizes goods on execution, cannot sue a bill of interpleader upon account of adverse claims existing to the property; for, as to one of the defendants, he necessarily admits himself to be a wrongdoer.⁵ It is essential, also, in every bill of interpleader, that the plaintiff should show that each of the defendants claims a right, and such a right as they may interplead for; for otherwise both the defendants may demur: the one, because the bill shows no claim of right against him; the other, because the bill showing no claim of right in the co-defendant, shows no cause of interpleader.⁶

§ 822. From the language used in some of the authorities it might perhaps be thought, that in cases of bills of interpleader, courts of equity had authority only to order the defendants to interplead at law. This would certainly be a very erroneous view of the jurisdiction. Indeed, it has been so rare, that interpleading

¹ [* *Reid v. Stearn*, 6 Jur. N. S. 267.

² *Cook v. Earl of Rosslyn*, 5 Jur. N. S. 973; *Ante*, § 811.

³ *Dutton v. Furness*, 12 Jur. N. S. 386.]

⁴ See *Metcalf v. Harvey*, 1 Ves. 248, 249; *Atkinson v. Manks*, 1 Cowen, R. 691, 708; *Darthez v. Winter*, 2 Sim. & Stu. 536; *Browning v. Watkins*, 10 S. & M. 482; [* *Briant v. Reed*, 1 McCarter, 271.]

⁵ *Slingsby v. Boulton*, 1 Ves. & B. 334; *Shaw v. Coster*, 8 Paige, R. 339.

⁶ *Mitford*, Eq. Pl. by Jeremy, p. 142, 143. The language of the Common Law Commissioners, in the Report to Parliament, March, 1830, p. 24, is: "The only course now resorted to for the relief of a person sued, or in danger of being sued by several claimants, is that of filing a bill to compel the parties, by the authority of a court of equity, to interplead at law." I have quoted these words in another place in the text (*Ante*, § 805), and have added a qualification. Probably the commissioners intended here to speak solely of legal rights.

bills have gone to a decree, that some doubts have been entertained as to what is the proper course. The result, upon a full examination of the subject, will be found to be, that courts of equity dispose of questions, arising upon bills of interpleader, in various modes, according to the nature of the question, and the manner in which it is brought before the court. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill does, which is brought by an executor or trustee to obtain the direction of the court upon the adverse claims of different defendants. If, therefore, at the hearing, the question between the defendants is ripe for a decision, the court will decide it. And if it is not ripe for a decision, the court will direct an issue, or a reference to a master, to ascertain contested facts, as may be best suited to the nature of the case.¹ Indeed, an issue, or a direction to interplead at law, would be obviously improper in all cases, except those where the titles on each side are purely legal. Equitable titles can only be disposed of by courts of equity; and, even as to legal titles, it is obvious, that in many cases a resort to an issue, or to an interpleader, to be had at law, would be unnecessary or inexpedient.

§ 823. The remedy by bill of interpleader, although it has cured many defects in the proceedings at law, has yet left many cases of hardship unprovided for. No attempt has been made in America (as far as I know) to remedy these grievances. But in England, an act of Parliament, recently passed, has given a far more expanded reach to the remedy of interpleader in courts of law, and extended its benefits to many cases of honest, but unavoidably doubtful litigation.² The jurisdiction in equity seems,

¹ *Angell v. Hadden*, 16 Ves. 203; *City Bank v. Bangs*, 2 Paige, R. 570.

² The act is the stat. of 1 and 2 Will. IV. ch. 58. It recites that it often happens that a person, sued at law for the recovery of money or goods, wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader. It then enacts, that upon application of a defendant sued in courts of law, in any action of assumpsit, debt, detinue, or trover, showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same; and that such defendant does not in any manner collude with such third party, but is ready to bring the money into court, &c., the court may make an order on such third party to appear and state his claim, &c. And powers are given to the courts to direct an issue to try the same. See 2 Chitty's General Practice, ch. 5, § 3, p. 342, 343, 344.

however, to have been left substantially upon its old foundations.

§ 824. But although a bill of interpleader, strictly so called, lies only where the party applying claims no interest in the subject-matter; yet, there are many cases where a bill, in the nature of a bill of interpleader, will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons. As, for instance, if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants in the nature of a bill of interpleader for relief.¹ So it seems, that a purchaser may file a bill in the nature of a bill of interpleader, against the vendor or his assignee, and any creditor who seeks to avoid the title of the assignee, and pray the direction of the court, as to whom the purchase-money shall be paid.² So, if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims between third persons, as to their title to the mortgage-money, he may bring them before the court, to ascertain their rights, and to have a decree for a redemption, and to make a secure payment to the party entitled to the money.³ In these cases, the plaintiff seeks relief for himself, whereas in an interpleading bill, strictly so called, the plaintiff only asks that he may be at liberty to pay the money, or deliver the property to the party to whom it of right belongs, and may, thereafter, be protected against the claims of both.⁴ In the latter case the only decree to which the plaintiff is entitled, is a decree that the bill is properly filed, or in other words, that he shall be at liberty to pay the money, or bring the property into court, and .

¹ *Mohawk and Hudson Railroad Company v. Clute*, 4 Paige, R. 384; *Thompson v. Ebbets*, Hopkins, R. 272. This same doctrine would apply to a case where a person was taxed in two towns for the same property, and did not know to which town tax should properly belong; and asked by his bill to have the amount of tax with which he was chargeable, as well as the persons to whom it was payable, ascertained. *Ibid.*; *Ante*, § 813 *a*.

² *Parks v. Jackson*, 11 Wendell, 443.

³ See *Goodrick v. Shotbolt*, Prec. Ch. 333, 334, 335, 336; *Bedell v. Hoffman*, 2 Paige, Rep. 199; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; 1 Madd. Ch. Pr. 146, 147; S. P. Gilb. Eq. Rep. 18.

⁴ See *ante*, § 807, 809; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Meux v. Bell*, 6 Sim. R. 175. See *East India Company v. Campion*, 11 Bligh, R. 158, 182, 185.

have his costs, and that the defendants interplead, and settle the conflicting claims between themselves.¹ So, a bill in nature of an interpleading bill, will lie by a bank, which has offered a reward for the recovery of money stolen, and a proportionate reward for a part recovered, where there are several claimants of the reward, or a proportion thereof, one or more of whom have sued the bank. And in such a bill all the claimants may be made parties, in order to have their respective claims adjusted.²

CHAPTER XXI.

BILLS QUIA TIMET.

[* § 825. Definition of bills *Quia timet*.

§ 826. Mode of redress.

§ 827. Seeks to preserve property for the party entitled.

§ 828. Proceedings against executors and administrators.

§ 829. Receivers act for the party ultimately entitled.

§ 829 *a*. Form of appointing receiver.

§ 830. Regard is had to legal and equitable priorities.

§ 831. The appointment rests in discretion. Officer of court.

§ 832. Importance of the discretion thus exercised.

§ 833. The receiver is put in possession as the agent of the court.

§ 833 *a*. And acts strictly under its control.

§ 833 *b*. Can only take possession against parties to the suit.

§ 834. Cases where a receiver will be appointed.

§ 835. Will not change the possession except for cause.

§ 836. Will not oust executors except for misconduct.

§ 837. Will not infringe the rights of prior incumbancers.

§ 838. Receiver appointed to apply rents to extinguish interest.

§ 839. Trustee often required to pay money into court.

§ 840. So may also the banker of such trustee.

§ 841. This is done to secure the fund.

§ 842. Will also require deposit of writings with master.

§ 843. Bills *Quia timet* to protect the interests of reversioners, &c.

§ 844. So also to protect a remainder in personalty.

§ 845. This remedy applied to all future interests in personalty.

¹ Anon. 1 Vern. R. 351; *Bedell v. Hoffman*, 2 Paige, R. 200; *Atkinson v. Manks*, 1 Cowen, R. 691; *Mohawk & Hudson Railroad Co. v. Clute*, 4 Paige, R. 384, 392; 1 Eq. Abridg. 80.

² *City Bank v. Bangs*, 2 Paige, R. 570; *Merchants' Bank of Providence v. Packhard and others*, Circuit Court of Rhode Island District, November Term, 1838. See *Gray v. Pitman*, 5 Scott, R. 795.

- § 845 a. The use of personal estate gives no right to possession.
- § 846, 847. One in remainder may demand security.
- § 848. Tenant for life may be decreed to keep down a charge on land.
- § 849. Sureties may protect themselves by bills *Quia timet*.
- § 850. Will decree specific performance of covenant to indemnify.
- § 850 a. Purchaser cannot maintain bill to secure mortgage on estate.
- § 851. Same redress allowed to prevent waste.]

§ 825. WE shall next consider **BILLS QUIA TIMET**.¹ They are so called, in analogy to certain writs of the Common Law, whose objects are of a similar nature. Lord Coke has explained this matter very clearly in his *Commentary on Littleton*. "And note" (says he) "that there be six writs in law, that may be maintained, *Quia timet*, before any molestation, distress, or impleading. As, (1.) A man may have a Writ of Mesne (whereof Littleton here speaks) before he be distrained; (2.) A *Warrantia Chartæ*, before he be impleaded; (3.) A *Monstraverunt*, before any distress or vexation; (4.) An *Audita Querela*, before any execution sued; (5.) A *Curia Claudenda*, before any default of inclosure; (6.) A *Ne injuste vexes*, before any distress or molestation. And these be called *Brevia anticipantia*, writs of prevention."²

§ 826. Now, bills in equity, *Quia timet*, answer precisely to this latter description. They are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are, ordinarily, applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity, because he fears (*Quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. The manner in which this aid is given by courts of equity is, of course, dependent upon circumstances. They interfere, sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it.³

¹ *Ante*, § 701 to 710, 730. See, also, Madd. Ch. Pr. 178, 179; Viner, Abridg. title, *Quia timet*, A. and B.; Mitf. Eq. Pl. by Jeremy, 148.

² Co. Litt. 100 a. See, also, Mitf. Eq. Pl. by Jeremy, 148.

³ Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, 2, p. 248 to 254; Id. B. 3, ch. 2, § 2, p. 350; *Post*, § 827, 828, 829, 830, 839, 845, 847.

§ 827. In regard to equitable property, the jurisdiction is equally applicable to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or contingent. The object of the bill in all such cases is, to secure the preservation of the property to its appropriate uses and ends; and wherever there is danger of its being converted to other purposes, or diminished, or lost, by gross negligence, the interference of a court of equity becomes indispensable. It will, accordingly, take the fund into its own hands, or secure its due management and appropriation, either by the agency of its own officers or otherwise. Thus, for instance, if property in the hands of a trustee for certain specific uses or trusts (either express or implied) is in danger of being diverted or squandered, to the injury of any claimant having a present or future fixed title thereto, the administration will be duly secured by the court, according to the original purposes, in such a manner as the court may, in its discretion, under all the circumstances, deem best fitted to the end; as by the appointment of a receiver, or by payment of the fund, if pecuniary, into court, or by requiring security for its due preservation and appropriation.¹

§ 828. The same principle is applied to the cases of executors and administrators, who are treated as trustees of the personal estate of the deceased party. If there is danger of waste of the estate, or collusion between the debtors of the estate and the executors or administrators, whereby the assets may be subtracted, courts of equity will interfere and secure the fund; and, in the case of collusion with debtors, they will order the latter to pay the amount of their debts into court.²

§ 829. The appointment of a receiver, when directed, is made for the benefit and on behalf of all the parties in interest, and not for the benefit of the plaintiff, or of one defendant only.³ It may be granted in any case of equitable property upon suitable circumstances. And, where there are creditors, annuitants, and others, some of whom are creditors at law, claiming under judg-

¹ Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, 2, p. 248 to 254; Id. B. 3, ch. 2, § 2, p. 350; *Post*, § 827, 828, 829, 830, 839, 845, 847.

² 1 Fonbl. Eq. B. 1, ch. 1, § 8, and note (*y*); *Elmsley v. Macauley*, 3 Bro. Ch. R. 624; *Taylor v. Allen*, 2 Atk. 213; *Utterson v. Mair*, 4 Bro. Ch. R. 277; *Mandeville v. Mandeville*, 8 Paige, R. 475; *Ante*, § 422, 423, 424, 581, and note; *Post*, § 836; *Story on Eq. Pleadings*, § 178, 514.

³ *Davis v. Duke of Marlborough*, 1 Swanst. R. 83; *S. C.* 2 Swanst. R. 125.

ments, and others are creditors, claiming upon equitable debts; if the property be of such a nature, that if legal, it may be taken in execution, it may, if equitable, be put into the possession of a receiver, to hold the same, and apply the profits under the direction of the court, for the benefit of all the parties, according to their respective rights and priorities.¹ The same rule applies to cases, where the property is legal, and judgment creditors have taken possession of it under writs of elegit; for it is competent for the court to appoint a receiver in favor of annuitants and equitable creditors, not disturbing the just prior rights, if any, of the judgment creditors.² Hence, the appointment of a receiver, in cases of this sort, is often called an equitable execution.³

[* § 829 *a*. The form of the appointment of the receiver depends upon the duty to be performed, the security required to be given by the receiver, and the mode of accountability required of him; all of which should strictly and properly be defined in the order of appointment. A form will be found in Ambler, which may be regarded as a convenient model.⁴ It is common in practice to require security to be given by the receiver, unless the parties consent he shall act without.]

§ 830. It has been said, that the general rule of equity to appoint a receiver for an equitable creditor against a person having an equitable estate, without prejudice to persons who have prior estates, is to be understood in this limited sense, that it is to be without prejudice to persons having prior legal estates, and so

¹ Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, p. 248; *Davis v. Duke of Marlborough*, 2 Swanst. R. 125, 135, 139, 145, 146, 173.

² *Davis v. Duke of Marlborough*, 1 Swanst. R. 83; S. C. 2 Swanst. R. 125, 135, 139, 140, 141, 145, 173; *White v. Bishop of Peterborough*, 3 Swanst. R. 117, 118.

³ *Ibid.* and Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, p. 248, 249.

⁴ [* Ambler, 599. After reciting the facts which laid the foundation for the appointment, and that the counsel consent, except those representing an infant party, who do not oppose it, and that it was agreed he should act upon the security of his own recognizance only, "It is further ordered, that the said A. B. be appointed receiver of the said estates, and continue to have the care and management thereof, upon his entering into a recognizance by himself, to be approved by the master, . . . if there should be occasion, duly and annually to account for what he shall receive, and to pay the same as this court shall direct; and the said master is to allow him a reasonable salary for his care and pains therein. And the tenants of the said estate are to attorn, &c., and pay their rents to said receiver, who is to be at liberty to let and set the said estates, from time to time, with the approbation of said master, as there shall be occasion."]

that it will not prevent their proceeding to obtain possession, if they think proper. And, with regard to persons having prior equitable estates, the court will take care, in appointing a receiver, not to disturb their prior equities; and for that purpose it will direct inquiries to determine the priorities among equitable incumbrancers; permitting legal creditors to act against the estates at law; and settling the priorities of equitable creditors.¹

§ 831. The appointment of a receiver is a matter resting in the sound discretion of the court;² and the receiver, when appointed, is treated as virtually an officer and representative of the court, and subject to its orders.³ Lord Hardwicke considered this power of appointment to be of great importance and most beneficial tendency; and he significantly said: "It is a discretionary power, exercised by the court, with as great utility to the subject, as any authority which belongs to it; and it is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled; and it does not at all affect the right."⁴

[* § 832. Such appointments resting in discretion, it is not easy to prescribe its limits. Its importance, however, seems to require that we should state the general principles by which its exercise is governed.⁵]

§ 833. Before doing so, it may not be without use to suggest, what some of those rights and incidents are; and the more so, as similar rights and incidents belong to cases of sequestration.⁶ In the first place, upon the appointment of a receiver of the rents and profits of real estate, if there are tenants in possession of the premises, they are compellable to attorn; and the court thus becomes virtually, *pro hac vice*, the landlord.⁷ In the next place, the appointment of such a receiver is generally deemed to entitle him to possession of the premises. It does not, indeed,

¹ Lord Eldon, in *Davis v. Duke of Marlborough*, 2 Swanst. R. 145, 146.

² *Skip v. Harwood*, 3 Atk. 564.

³ *Jeremy on Eq. Jurisd.* B. 1, ch. 7, p. 248, 249; *Angel v. Smith*, 9 Ves. 335; *Hutchinson v. Massareene*, 2 B. & Beatt. 55.

⁴ *Skip v. Harwood*, 3 Atk. 564.

⁵ See *Angel v. Smith*, 9 Ves. 338.

⁶ *Jeremy on Eq. Jurisd.* B. 1, ch. 7, § 1, p. 248, 249; *Angel v. Smith*, 9 Ves. 338; *Silver v. Bishop of Norwich*, 3 Swanst. R. 112, note; *Id.* 117; *Sharp v. Carter*, 3 P. Will. 379; *Cox's note* (C).

⁷ *Sharp v. Carter*, 3 P. Will. 379. See *Albany City Bank v. Schermerhorn*, 9 Paige, R. 372.

in all cases, amount to a turning of the other party out of possession ; for, in many cases, as in the case of an infant's estate, the receiver's possession is that of the infant. But where the rights are adverse in the different parties in the suit, the possession of the receiver is treated as the possession of the party who ultimately establishes his right to it. The receiver, however, cannot proceed in any ejectment against the tenants of any estate, except by the authority of the court.¹ Nor will the possession of the tenants be ordinarily disturbed by the court, where a receiver is appointed. But, although not parties to the suit, the tenants may, and will, in certain cases, be compelled to attorn to the receiver.²

§ 833 *a*. In the next place, a receiver, when in possession, has very little discretion allowed him ; but he must apply, from time to time, to the court for authority to do such acts as may be beneficial to the estate. Thus, he is not at liberty to bring or to defend actions ; or to let the estate ; or to lay out money ; unless by the special leave of the court.³ In the next place, when such a receiver is in possession, under the process or authority of the court, in execution of a decree or decretal order, his possession is not to be disturbed, even by an ejectment under an adverse title, without the leave of the court. For his possession is deemed the possession of the court ; and the court will not permit itself to be made a suitor in a court of law.⁴ The proper and usual mode, adopted under such circumstances, is, for the party, claiming an adverse interest, to apply to the court to be permitted to come in, and be examined *pro interesse suo*. He is then allowed to go before the master, and to state his title, upon which he may, in the first instance, have the judgment of the master, and ultimately, if necessary, that of the court. And, where the question to be tried is a pure matter of title, which can be tried in an ejectment, the court, from a sense of convenience and justice, will generally authorize such a suit to be brought, taking care, however, to protect the possession by giving proper directions.⁵

¹ *Wynn v. Lord Newborough*, 3 Bro. Ch. R. 88 ; S. C. 1 Ves. Jr. 164.

² See *Insur. Co. v. Stebbins*, 8 Paige, R. 565.

³ *Jeremy on Eq. Jurisd.* B. 1, ch. 7, § 1, p. 252, 253.

⁴ *Post*, § 891 ; *Parker v. Browning*, 8 Paige, R. 388.

⁵ *Angel v. Smith*, 9 Ves. 338, 339 ; *Brooks v. Greathed*, 1 Jac. & Walk. 178 ; *Bryan v. Cormick*, 1 Cox, R. 422 ; *Hayes v. Hayes*, 1 Ch. Cas. 223 ; *Post*, § 891 ; *Empringham v. Short*, 3 Hare, R. 461 ; *Evelyn v. Lewis*, 3 Hare, 472, 475.

§ 833 b. Where a receiver is appointed, and the property is in possession of a third person, who claims a right to retain it, the receiver must either proceed by a suit in the ordinary way, to try his right to it, or the plaintiff in equity should make such third person a party to the suit, and apply to the court to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made, which will be binding upon him, and which may be enforced by process of contempt, if it is not obeyed.¹ And, whenever the property is in possession of a third person, under a claim of title, the court will not protect the officer, who attempts by violence to obtain possession thereof, any farther than a court of law will protect him; his right to take possession of the property, of which he has been appointed the receiver, not being questioned.²

¹ *Parker v. Browning*, 8 Paige, R. 388; *Albany City Bank v. Schermerhorn*, 9 Paige, R. 372.

² *Ibid.*; in *Parker v. Browning*, Mr. Chancellor Walworth said: "It is not necessary, in any case, for the receiver to put himself in a situation where he is not entitled to the full protection of this court; as he is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself, by force, and without an express order of the court, directing him to do so. The proper course, as this court has repeatedly decided, where the defendant is directed to deliver over his property to the receiver, under the direction of a master, is for the receiver, or the party who wishes for an actual delivery of the property, in addition to the legal assignment thereof, to call upon the master to decide, upon the examination of the defendant, and on the evidence before him, what property legally or equitably belonging to the defendant, and to which the receiver is entitled under the order of the court, is in the possession of the defendant, or under his power and control. And it is the duty of the master to direct the defendant to deliver over to the receiver the actual possession of all such property, in such manner and within such time as the master may think reasonable. Where such a direction is given, the defendant, if he is dissatisfied with the decision of the master, must apply to the court to review the same, or he will be compelled, by process of contempt, to comply with that decision. And if the property is in the possession of a third person, who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands; so that an order for the delivery of the property may be made, which will be binding upon him, and which may be enforced by process of contempt, if it is not obeyed. Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law; so that a third person claiming the same may be compelled to come in and ask to be examined

§ 834. We have already named some cases where a receiver will be appointed.¹ In cases, also, where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed.²

§ 835. But it is not infrequent for a bill *Quia timet* to ask for the appointment of a receiver, against a party who is rightfully in possession, or who is entitled to the possession of the fund, or who has an interest in its due administration. In such cases, courts of equity will pay a just respect to such legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts, averred and established in proof, show, that there has been an abuse, or is danger of abuse on his own part. For the rule of such courts is not to displace a *bonâ fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference.³

§ 836. This principle may be easily illustrated in the common case of executors and administrators. They are by law intrusted with authority to collect and administer the assets of the deceased party; and courts of equity will not interfere with their management and administration of such assets upon slight grounds. Whenever, therefore, the appointment of a receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs, that there is some positive loss, or danger of loss, of the funds; as, for instance, some waste or misapplication of the funds, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct, or negligence of the executor or administrator.⁴ Mere poverty of the party will not,

pro interesse suo, if he wishes to test the justice of such claim. But where the property is in the possession of a third person, under a claim of title, the court will not protect the officer who attempts, by violence, to obtain possession, any farther than the law will protect him; his right to take possession of the property, of which he has been appointed receiver, being unquestioned."

¹ *Ante*, § 829.

² *Huguenin v. Baseley*, 13 Ves. 105; *Stillwell v. Williams*, 6 Madd. R. 49; *S. C. Stillwell v. Wilkins*, Jacob, R. 280.

³ *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 3, p. 174; *Id.* B. 1, ch. 7, § 1, p. 249, 250. See *Tyson v. Fairclough*, 2 Sim. & Stu. 142.

⁴ *Jeremy on Eq. Jurisd.* B. 1, ch. 7, § 1, p. 248, 249; *Mandeville v. Mandeville*, 8 Paige, R. 475; *Ante*, § 422, 828.

of itself, constitute a sufficient ground; but there must be other ingredients to justify the appointment.¹

§ 837. So, where there are several encumbrances on an estate, as the first encumbrancer is entitled to the possession of the estate and the receipt of the rents and profits, a court of equity will not deprive him of such possession and profits, unless upon sufficient cause shown.² But if the first encumbrancer is not in possession, and does not desire it; or if he has been paid off; or if he refuses to receive what is due to him; there, a receiver may be appointed upon the application of a subsequent encumbrancer.³ But in all cases of this sort, where the court acts in favor of subsequent encumbrancers, it is cautious, in thus interfering, not to disturb any prior rights or equities; and, therefore, before it acts finally, it will endeavor to ascertain the priorities and equities of all the encumbrancers; and then it will apply the funds, which are received, according to such priorities and equities, in case the encumbrancers entitled thereto shall make a seasonable application for the purpose.⁴

§ 838. So, where the tenants of particular estates for life, or in tail, neglect to keep down the interest due upon encumbrances upon the estates, courts of equity will appoint a receiver to receive the rents and profits, in order to keep down the interest; for this is but a mere act of justice to the encumbrancers, and also to those who may be otherwise interested in the estates.⁵ But here, again, it is to be remembered, that the court will not force encumbrancers to receive their interest; and therefore, if they would avail themselves of the privileges of receiving the interest, they must make a seasonable application for the purpose.⁶

§ 839. But although courts of equity will not appoint a receiver,

¹ Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, p. 249, 250; *White v. Bishop of Peterborough*, 3 Swanst. R. 107; *Davis v. Duke of Marlborough*, 2 Swanst. R. 113.

² Ibid.; *Rowe v. Wood*, 2 Jac. & Walk. 554, 557; *Berney v. Sewell*, 1 Jac. & Walk. 649; *Quarrell v. Beckford*, 13 Ves. 377; *Codrington v. Parker*, 16 Ves. 469.

³ Ibid.; *Bryan v. Cormick*, 1 Cox, R. 422; *Norway v. Rowe*, 19 Ves. 153; *White v. Bishop of Peterborough*, 3 Swanst. R. 109.

⁴ Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, p. 250, 251; *Davis v. Duke of Marlborough*, 2 Swanst. R. 145, 146; 19 Ves. 153; 1 Swanst. R. 74.

⁵ Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, p. 251, 252; *Giffard v. Hart*, 1 Sch. & Lefr. 407, note; *Bertie v. Lord Abingdon*, 3 Meriv. R. 560.

⁶ Ibid.; *Gresley v. Adderly*, 1 Swanst. R. 579, and note; *Bertie v. Lord Abingdon*, 3 Meriv. R. 560, 566, 567, 568.

except upon special grounds, justifying such an interference in the nature of a bill *Quia timet*; yet there are cases in which it will interpose, and require money to be paid into court by a party who stands in the relation of a trustee to the property, without any ground being laid to show that there has been any abuse or any danger to the fund.¹ Thus, in cases of bills brought by creditors, or legatees, or distributees, against executors or administrators, for a settlement of the estate, if the executors or administrators, by their answers, admit assets in their hands, and the court takes upon itself a settlement of the estate, it will direct the assets to be paid into court.²

§ 840. The like doctrine has been applied to cases where an executor or administrator has lodged funds of the estate in the hands of a banker, avowedly as assets. In such cases, upon the application of a party in interest, as, for instance, of a creditor or a legatee, the banker will be directed to pay the money into court; for it is a rule in equity to follow trust-money whenever it may be found in the hands of any person who has not *primâ facie* a right to hold it, and to order him to bring it into court. And this may be done, even without making the executor or administrator a party to the suit, especially if there be a doubt of the safety of the fund.³

§ 841. The general rule, upon which courts of equity proceed in requiring money to be paid into court, is this, that the party, who is entitled to the fund, is also entitled to have it secured. And this rule is equally applicable to cases where the plaintiffs, seeking the payment, are solely entitled to the whole fund, and to cases where they have acquired such an interest in the whole fund, together with others, as entitles them, on their own behalf and the behalf of others, to have the sum secured in court.⁴ Now, this is

¹ Jeremy on Eq. Jurisd. 1, ch. 7, § 2, p. 253, 254; Id. B. 3, ch. 2, § 2, p. 351, 352; *Ante*, § 549.

² *Strange v. Harris*, 3 Bro. Ch. R. 365; *Blake v. Blake*, 2 Sch. & Lefr. 26, 27; *Yare v. Harrison*, 2 Cox, R. 377; *Ante*, § 543, 544, 546. See *Mandeville v. Mandeville*, 8 Paige, R. 475.

³ See *Leigh v. Macaulay*, 1 Younge & Coll. 260; *Bogle v. Stewart*, cited *Ibid.* p. 265, 266; *Bowsher v. Watkins*, 1 Russ. & Mylne, 277; *Gedge v. Trail*, *Ibid.*, 281, note.

⁴ *Ibid.*; *Freeman v. Fairlie*, 3 Meriv. R. 29, 30; *Cruikshanks v. Robarts*, 6 Madd. R. 104; *Johnson v. Aston*, 1 Sim. & Stu. R. 73; *Rothwell v. Rothwell*, 2 Sim. & Stu. R. 217; *Orrok v. Binney*, 1 Jac. R. 523.

precisely the case in what is commonly called a creditor's bill for the administration of an estate.¹

§ 842. And courts of equity will, in cases of this sort, not only order money to be paid into court, but they will also direct that papers and writings in the hands of executors and administrators shall be deposited with a master, for the benefit of those interested, unless there are other purposes, which require that they should be retained in the hands of the executors or administrators.²

§ 843. The preceding remarks are principally (but not exclusively) applicable to cases of equitable property, whether the right of enjoyment thereof be present, future, or contingent. In regard to legal property it is obvious, that, where the right of enjoyment is present, the legal remedies will be generally found sufficient for the protection and vindication of that right. But where the right of enjoyment is future or contingent, the party entitled is often without any adequate remedy at law, for any injury which he may in the mean time sustain by the loss, destruction, or deterioration of the property, in the hands of the party who is entitled to the present possession of it. Thus, for instance, if personal property should be given by a will to A. for life, and after his death to B., there is at law no remedy to secure the legacy to B., whether it be of specific chattels, or of a pecuniary nature.³

§ 844. Indeed, by the ancient common law, there could in general be no future right of property, created in personal goods and chattels, to take place in expectancy; for they were considered to be of so transitory a nature, and so liable to be lost, destroyed, or otherwise impaired, that future interests in them were not, in the law, treated as of any account.⁴ An exception was permitted, at an early period, as to goods and chattels given by will in remainder, after a bequest for life. But that was at first allowed only where the use of the goods or chattels, and not the goods or chattels themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the testator.⁵ That distinction has since been disregarded; and the limitation in

¹ *Ante*, § 543, 544, 546.

² *Freeman v. Fairlie*, 3 Meriv. R. 29, 30; *Clark v. Clark*, 8 Paige, R. 152.

³ *Ante*, § 603; 1 Eq. Abridg. 360, pl. 4; *Clark v. Clark*, 8 Paige, R. 152.

⁴ 2 Black. Com. 398; 1 Eq. Abridg. pl. 4; *Fearne on Conting. Rem. by Butler* (7th edit.), p. 401 to 407; *Id.* 413, 414.

⁵ *Ibid.*; *Hyde v. Parrat*, 1 P. Will. 1, and cases there cited; *Tissen v. Tissen*, 1 P. Will. 502.

remainder is now equally respected, whether the first legatee takes the use or the goods and chattels themselves for life.¹

§ 845. In all cases of this sort, where there is a future right of enjoyment of personal property, courts of equity will now interpose and grant relief upon a bill *Quia timet*, where there is any danger of loss, or deterioration, or injury to it, in the hands of the party who is entitled to the present possession.² We have already had occasion to take notice of the manner in which this remedial jurisdiction is applied in cases of legacies, whether pecuniary or specific, and whether vested or contingent.³ The same doctrine is applied to cases of annuities, charged on the personal estate.⁴

§ 845 *a*. Indeed, the doctrine may now be deemed well established, that the bequest of the use of the residue of the personal estate of the testator to a legatee for life, or for a shorter period, with a bequest over to other legatees, does not give the legatee for life, or for a shorter period, the right to the possession of the fund in the mean time. But the executor is entitled to retain the fund in his own hands, and to pay over the income thereof to

¹ *Ibid.*; Anon. 2 Freem. R. 145; *Id.* 206; *Hyde v. Parrat*, 1 P. Will. 1, 6; *Upwell v. Halsey*, 1 P. Will. 651; *Vachel v. Vachel*, 1 Cas. Chan. 129, 130; *Foley v. Burnell*, 1 Bro. Chan. Rep. 274, 278; Co. Litt. 20 (*a*), Harg. note (5); *Fearne on Conting. Rem. and Exec. Dev.* (7th edit.), by Butler, p. 401 to 407; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4. This subject is discussed very much at large in Mr. Fearne's *Essay on Contingent Remainders and Executory Devises*, from p. 401 to 407 (7th edit.), by Butler. There is in the same work a very valuable discussion upon the rights of the tenant for life in the goods and chattels, and how far the same may be taken in execution by his creditors. The result of the whole discussion seems to be, that the creditors cannot subject the property to their claims beyond the rights of the tenant for life therein. Mr. Fearne seems to consider that the validity of executory dispositions of personal chattels (i. e. in remainder after a life-estate) was originally founded, and still rests, on the doctrine and interposition of courts of equity. But he admits, that in chattels real, the right is recognized at law. *Fearne on Conting. Rem.* p. 412, 413 (7th edit.); *Matthew Manning's case*, 8 Co. R. 95; *Lampet's case*, 10 Co. R. 47; *Post*, § 847, note. See, also, 2 Kent, Comm. Lect. 35, p. 352, 353; 1 Chitty, Gen. Pract. 101; Bacon, Abridg. Uses and Trusts, G. 2, p. 109 (Gwillim's edit.); *Wright v. Cartwright*, 1 Burr. 282; *Clark v. Clark*, 8 Paige, R. 152. [* See *Smith's Will*, in re, 20 Beavan, 197.]

² See *James v. Scott*, 9 Ala. 579; *Emmons v. Cairns*, 2 Sandf. Ch. R. 369.

³ *Ante*, § 603, 604; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (*d*); 1 Madd. Ch. Pr. 178 to 181; *Fearne on Conting. Rem.* p. 413 (7th edit.), by Butler; *Id.* 414; *Covenhoven v. Shuler*, 2 Paige, R. 123; *Clark v. Clark*, 8 Paige, R. 152.

⁴ *Batten v. Earnley*, 2 P. Will. 163; *Slanning v. Style*, 3 P. Will. 336, 337.

the legatee for life, or for a shorter period, as it occurs from time to time. And, at all events, if he suffers the fund to go into the possession of such legatee, to enable him to enjoy the due use or income thereof, he is bound to take ample security for the safe return of the fund, at the termination of the particular estate therein. If the executor omits to take such security, he may become personally responsible for any loss accruing thereby.¹

§ 846. The same remedial justice will be applied to other cases, as well as to legacies and personal annuities. Thus, for instance, where a future interest in personal property is assigned by the owner to his creditors, the latter may come into a court of equity, to have the property secured to their future use.² On one occasion of this sort, Lord Hardwicke said, that nothing was better settled than that, "Whenever a demand was made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor to have it secured for his benefit, and set apart in the mean time, that he might not be obliged to pursue those assets through several hands. Nor is there any ground for the distinction taken between a legacy and a demand by contract."³ [So, where a life-interest in personal property is sold on execution against the owner of such life-estate, and the purchaser claims the absolute property, the remainder-men may, by a bill in equity, compel the purchaser to give security for the production of such property on the termination of his interest.⁴]

§ 847. Upon the same ground, where, under marriage articles, the plaintiff, in case she survived her husband, had a contingent interest in certain South Sea annuities, and a certain promissory note, which were specifically appointed for the payment of the same, to be allowed her, and the defendant had threatened to aliene the property and securities, on a bill *Quia timet*, a decree was made, that the defendant should give security to have the same forthcoming.⁵

¹ *Clark v. Clark*, 8 Paige, R. 152, 160; *Covenhoven v. Shuler*, 2 Paige, R. 122.

² *Johnson v. Mills*, 1 Ves. 282, 283.

³ *Ibid.*

⁴ *McDougal v. Armstrong*, 6 Humph. 428; 6 Humph. 157; *Bowling v. Bowling*, 6 B. Monroe, 31.

⁵ *Flight v. Cook*, 2 Ves. 619; *Post*, § 955. This doctrine is discussed at large in *Eq. Abridg.* 360, pl. 4; and the following extract shows the gradual establishment of it. "But what seems most proper to be inquired into under this head, is

§ 848. So, where a party, seised of lands in fee, grants a rent-charge in fee, issuing thereout, and afterwards devises the lands to A. for life, with remainder to B. in fee, B. may maintain a bill *Quia timet*, to compel A. to pay the arrears during his life, for fear that otherwise the whole would fall on his reversionary estate.¹ And the like principle would apply, under like circumstances, to a legacy, payable *in futuro*, and chargeable on land, to compel the tenant for life to pay or secure a proportion of the legacy.²

§ 849. Another case of the application of the remedial justice

the reason and practice of limiting remainders in personal goods or chattels, for they, in their own nature, seem incapable of such a limitation, because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and also the exigencies of trade and commerce requiring a frequent circulation thereof, it would put a stop to all trading, and occasion perpetual suits and quarrels, if such limitations were generally tolerated and allowed. But yet, in last wills and testaments, such limitations over of personal goods or chattels have sometimes prevailed, especially where the first devisee had only the use or occupation thereof devised to him. For then, they held the property to continue in the executors of the testator, and that the first devisee had no power to alter or to take it from them. Yet, in either case, if the first devisee did actually give, grant, or sell such personal goods or chattels, the judges would very rarely allow of actions to be brought by those in remainder for recovery thereof. Hence it came to pass, that it was a long while ere the judges of the common law could be prevailed on to have any regard for a devise over, even of a chattel real, or a term for years after an estate for life limited thereon; because the estate for life being in the eye of the law of greater regard and consideration than an estate for years, they thought he, who had it devised to him for life, had therein included all that the devisor had a power to dispose of. And though they have now gained that point upon the ancient common law, by establishing such remainders, and have thereby brought that branch out of the chancery (where they frequently helped the remainder-man, by allowing of bills to compel the first devisee to give security), yet it was at first introduced into the common law, under the new name of *Executory Devise*, and took all the sanction it has since received from thence, and not as a remainder (for which *vide* title *Devise*). But as to personal goods and chattels, the common law has provided no sufficient remedy for the devisee in the remainder of them, either during the life of the first devisee, or after his death; therefore the chancery seems to have taken that branch to themselves in lieu of the other, which they lost, and to allow of the same remedy for such devisee in remainder of personal goods and chattels, as they before did to the devisee in remainder of chattels real, or terms for years." See also *Fearne on Conting. Rem. and Ex. Dev.* p. 401 to 415, by Butler (7th edit.); *Ante*, § 843, 844; *Bacon, Abridg. Uses and Trusts*, G. 2, by Gwillim.

¹ *Hayes v. Hayes*, 1 Ch. Cas. 223.

² *Ibid.*

of courts of equity by a bill *Quia timet* is in cases of sureties of debtors and others, which we have fully explained.¹

§ 850. So, courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages only, upon the same principle that they will entertain a bill *Quia timet*, and this not only at the instance of the original covenantee, but of his executors and administrators.² Thus, where a party had assigned several shares of the excise to A., and the latter covenanted to save the assignor harmless in respect to that assignment, and to stand in his place, touching the payments to the king, and other matters, and afterwards the king sued the assignor, for money which the assignee ought to have paid, the court decreed that the agreement should be specifically performed, and referred it to a master, and directed, that *toties quoties* any breach should happen, he should report the same specially to the court, so that the court might, if there should be occasion, direct a trial at law in a *quantum damnificatus*. The court further decreed, that the assignee should clear the assignor from all these suits and encumbrances within a reasonable time.³ The case was compared to that of a counter-bond, where, although the surety is not molested, or troubled for the debt, yet, after the money becomes payable, the court will decree the principal to pay it.⁴

¹ *Ante*, § 327, 330, 639, 722, 729; Mitf. Eq. Pl. by Jeremy, p. 148; *King v. Baldwin*, 2 Johns. Ch. R. 561, 562; *Hayes v. Ward*, 4 Johns. R. 132; *Nisbet v. Smith*, 2 Bro. Ch. R. 581 (Belt's edit.), and note (5); *Ranelaugh v. Hayes*, 1 Vern. 190; *Stephenson v. Taverners*, 9 Gratt. 398; *King v. Baldwin*, 2 Johns. Ch. R. 561, 562; *Hayes v. Ward*, 4 Johns. Ch. R. 132. The cases of *Rees v. Berrington*, 2 Ves. Jr. 540, and *Nesbit v. Smith*, 2 Bro. Ch. R. 578, do not seem to establish this principle of relief against the creditor. But in the case of *Wright v. Simpson* (6 Ves. 734), Lord Eldon seems to admit, that the surety might have a right to compel the creditor to proceed against the debtor under some circumstances. But, then, in such a case, the surety is compellable to deposit the money in court for the payment of the creditor. So, that, in fact, it is but the case of an indirect subrogation to the rights of the creditor, upon a virtual payment of the debt by such a deposit. See *Hayes v. Ward*, 4 Johns. Ch. R. 129 to 134, where this subject is much discussed, and the principles of the Roman law are fully stated.

² *Champion v. Brown*, 6 Johns. Ch. R. 406; *Ante*, § 730.

³ *Ranelaugh v. Hayes*, 1 Vern. R. 189; S. C. 2 Ch. Cas. 146; Mitf. Eq. Pl. by Jeremy, 148.

⁴ *Ibid.*; *Lee v. Rook*, Moseley, R. 318; *Pember v. Mathers*, 1 Bro. Ch. R. 53; *Champion v. Brown*, 6 Johns. Ch. R. 405, 406; *Ante*, § 327, 722, 729, 849.

[* § 850 *a*. In a recent case¹ of considerable magnitude, the national court of last resort, upon thorough review of the cases, held, that where one had purchased land, which he knew at the time to be encumbered by a mortgage, under a contract that upon payment of the purchase-money the vendor should convey "with general warranty of title," and had taken possession of the land and made extensive and valuable improvements upon it, and paid the purchase-money, he could not maintain a bill in equity, to compel the executor and heir of the vendor to remove the encumbrance, or make a deposit by way of indemnity to the vendee; and the decree of the Circuit Court, granting the relief asked, was reversed, on the ground that the parties must be content to stand upon the terms of their contract.]

§ 851. There are other cases, where a remedial justice is applied in the nature of bills *Quia timet*, as where courts of equity interpose to prevent the waste, or destruction, or deterioration of property, *pendente lite*, or to prevent irreparable mischief. But these cases will more properly come under review in our subsequent inquiries in matters of injunction.²

CHAPTER XXII.

BILLS OF PEACE.

[* § 852, 853. Bills of Peace, to establish rights and save controversy.

§ 854. They determine, and establish, the rights of all parties.

§ 855. Cases illustrative of the remedy.

§ 856. This remedy applied to rights of fishery, common, &c.

§ 857. Will not be resorted to for two interests only.

§ 858. Nor to establish private right against public.

§ 859. But will, to quiet claims already established at law.

§ 860. This remedy is extended to other analogous cases.]

§ 852. We come, in the next place, to the consideration of what are technically called BILLS OF PEACE.³ These bills sometimes

¹ [* *Refeld v. Woodfolk*, 22 How. R. 318.]

² See, also, *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 2, p. 353, 354; 1 *Madd. Ch. Pr.* 183, 184; *Post*, § 907, 908, 912 to 920.

³ See *Mitf. Eq. Pl. by Jeremy*, 145, 148; *Co. Litt.* 100 (*a*).

bear a resemblance to bills *Quia timet*.¹ Bills *Quia timet*, however, are quite distinguishable from the former in several respects, and are always used as a preventive process, before a suit is actually instituted; whereas Bills of Peace, although sometimes brought before any suit is instituted to try a right, are most generally brought after the right has been tried at law. It is not my design, in this place, to enter upon the subject of the cases generally, in which courts of equity will decree a perpetual injunction; for that will more properly be examined under another head;² but simply to treat of bills seeking an injunction, and strictly falling under the denomination of Bills of Peace.

§ 853. By a Bill of Peace we are to understand a bill brought by a person to establish and perpetuate a right, which he claims, and which, from its nature, may be controverted by different persons, at different times, and by different actions; or, where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right, if it is already sufficiently established; or if it should be sufficiently established under the direction of the court.³ The obvious design of such a bill is to procure repose from perpetual litigation, and, therefore, it is justly called a Bill of Peace. The general doctrine of public policy, which, in some form or other, may be found in the jurisprudence of every civilized country, is, that an end ought to be put to litigation, and, above all, to fruitless litigation; *Interest reipublicæ ut sit finis litium*. If suits might be perpetually brought to litigate the same questions between the same parties, or their privies, as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would only become the signal for the institution of a new one; and the expenses might become ruinous to all the parties. The obvious ground of the jurisdiction of courts of equity, in cases of this sort, is to suppress useless litigation, and to prevent multiplicity of suits.

§ 854. One class of cases, to which this remedial process is properly applied, is, where there is one general right to be estab-

¹ *Ante*, § 825.

² *Post*, § 873 to 958.

³ See *Eldridge v. Hill*, 2 Johns. Ch. R. 281, 282; *Alexander v. Pendleton*, 8 Cranch, R. 462, 468; 3 Wooddes. Lect. 56, p. 416, 417.

lished against a great number of persons. And it may be resorted to, either where one person claims or defends a right against many, or where many claim or defend a right against one.¹ In such cases, courts of equity interpose in order to prevent multiplicity of suits;² for, as each separate party may sue, or may be sued, in a separate action at law, and each suit would only decide the particular right in question between the plaintiff and defendant in that action, litigation might become interminable. Courts of equity, therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right; and, if it be necessary, they will ascertain it by an action or issue at law, and then make a decree finally binding upon all the parties.³

* ¹ Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 343; *Eldridge v. Hill*, 2 Johns. Ch. R. 281; *Alexander v. Pendleton*, 8 Cranch, R. 462, 468.

² *Elme Hospital v. Andover*, 1 Vern. 266; *Hanson v. Gardiner*, 7 Ves. 309, 310; *Ware v. Horwood*, 14 Ves. 32, 33; *Dilley v. Doig*, 2 Ves. Jr. 486; *Cooper*, Eq. Pl. Intro. xxxiv.; *Eldridge v. Hill*, 2 Johns. Ch. R. 281.

³ *Eden on Injunctions*, ch. 16, p. 358, 359, 360; *Cooper*, Eq. Pl. ch. 3, p. 153, 154; *Gilb. Forum Roman.* 195; 1 *Madd. Ch. Pr.* 140, 141; 2 *Eq. Abridg.* 172, pl. 3, 5; *Mitford*, Eq. Pl. by Jeremy, 147; *Tenham v. Herbert*, 2 Atk. R. 483, 484; *Eldridge v. Hill*, 2 Johns. Ch. R. 281, 282; *Trustees of Huntington v. Nicoll*, 3 Johns. R. 566, 589, 590, 591, 595, 602, 603. The nature of this jurisdiction is thus stated by Lord Redesdale: "Courts of equity will also prevent multiplicity of suits; and the cases in which it is attempted, and the means used for that purpose, are various. With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right. Thus, where a right of fishery was claimed by a corporation throughout the course of a considerable river, and was opposed by the lords of manors and owners of lands adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was overruled. As the object of such bills is to prevent multiplicity of suits, by determining the rights of the parties upon issues directed by the court, if necessary for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and the defendant in it, such a bill can scarcely be sustained, where a right is disputed between two persons only, until the right has been tried and decided upon at law. Indeed, in most cases it is held, that the plaintiff ought to establish his right by a determination of a court of law in his favor, before he files his bill in equity. And, if he has not so done, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold. If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may bring a bill to establish it, though he has not previously recovered in affirmance of it at law, and in such a case a demurrer has been overruled." *Mitf. Eq. Pl. by Jeremy*, 145, 146.

§ 855. Bills of this nature may be brought by a parson for tithes against his parishioners ; by parishioners against a parson to establish a modus ; by a lord against tenants for an encroachment under color of a common right ; or by tenants against the lord for disturbance of a common right ; by a party in interest to establish a toll due by a custom ; by a like party to establish the rights to profits of a fair, there being several claimants ; by a lord to establish an enclosure, which he has approved under the statute of Merton, and which his tenants throw down, although sufficient common of pasture is left.¹

§ 856. So, where a party has possession, and claims a right of fishery for a considerable distance on a river, and the riparian proprietors set up several adverse rights ; he may have a Bill of Peace against all of them to establish his right, and quiet his possession.² So, a Bill of Peace will lie to settle the amount of a general fine to be paid by all the copyhold tenants of a manor. So, it will lie to establish a right of common of the freehold tenants of a manor.³ So, it will lie to establish a duty, claimed by a municipal corporation against many persons, although there is no privity between them.⁴

§ 857. But to entitle a party to maintain a Bill of Peace, it must be clear that there is a right claimed, which affects many persons, and that a suitable number of parties in interest are brought before the court ; for, if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed ; for it cannot then conclude any persons, but the very defendants.⁵

¹ Ibid. ; *How v. Tenants of Bromsgrove*, 1 Vern. 22 ; *Elme Hospital v. Andover*, 1 Vern. 266 ; *Pawlet v. Ingres*, 1 Vern. 308 ; *Brown v. Vermuden*, 1 Ch. Cas. 272 ; *Rudge v. Hopkins*, 2 Eq. Abridg. p. 170, pl. 27 ; *Conyers v. Abergavenny*, 1 Atk. 284, 285 ; *Poor v. Clark*, 2 Atk. 515 ; *Weeks v. Slake*, 2 Vern. 301 ; *Arthington v. Fawkes*, 2 Vern. 356 ; *Corporation of Carlisle v. Wilson*, 13 Ves. 279, 280 ; *Hanson v. Gardiner*, 7 Ves. 305, 309, 310 ; *Duke of Norfolk v. Myers*, 4 Madd. Rep. 50, 117.

² *Mayor of York v. Pilkington*, 1 Atk. R. 282 ; *Tenham v. Herbert*, 2 Atk. R. 483. See *New River Company v. Graves*, 2 Vern. 431, 432.

³ *Middleton v. Jackson*, 1 Ch. Rep. 18 (33) ; *Popham v. Lancaster*, 1 Ch. Rep. (96) ; *Cowper v. Clerk*, 3 P. Will. 157 ; *Powell v. Powis*, 1 Younge & Jerv. 159.

⁴ *City of London v. Perkins*, 4 Bro. Parl. R. 157 ; 1 Madd. Ch. Pr. 138, 139 ; *Mayor of York v. Pilkington*, 1 Atk. R. 284 ; *Tenham v. Herbert*, 2 Atk. 483, 484.

⁵ *Disney v. Robertson*, Bunb. R. 41 ; *Cowper v. Clerk*, 3 P. Will. 157 ; *Welby v. Duke of Rutland*, 6 Bro. Parl. R. 575 ; S. C. 3 Bro. Parl. Cas. by Tomlins, 39 ;

§ 858. It seems, too, that courts of equity will not, upon a bill of this nature, decree a perpetual injunction for the establishment or the enjoyment of the right of a party, who claims in contradiction to a public right; as if he claims an exclusive right to a highway, or to a common navigable river, or an exclusive right to a rope-ferry across a river; for it is said, that this would be to enjoin all the people of the state or country.¹ But the true principle is, that courts of equity will not, in such cases, upon principles of public policy, intercept the assertion of public rights.

§ 859. Another class of cases to which Bills of Peace are now ordinarily applied, is, where the plaintiff has, after repeated and satisfactory trials, established his right at law; and yet is in danger of further litigation and obstruction to his right from new attempts to controvert it. Under such circumstances, courts of equity will interfere, and grant a perpetual injunction to quiet the possession of the plaintiff, and to suppress future litigation of the right.² This exercise of jurisdiction was formerly much questioned. Lord Cowper, in a celebrated case, where the title to land had been five several times tried in an ejectment, and five verdicts given in favor of the plaintiff, refused to sustain the jurisdiction for a perpetual injunction; and said that the application was new, and did not fall under the general notion of a Bill of

Mitford, Eq. Pl. by Jeremy, 169, 170; Cooper Eq. Pl. ch. 1, p. 41; 1 Madd. Ch. Pr. 140; Weller v. Smeaton, 1 Bro. Ch. R. 572; Baker v. Rogers, 2 Eq. Abridg. 171, pl. 2; Select Cas. in Ch. 74, 75; Alexander v. Pendleton, 8 Cranch, R. 462, 468.

¹ 1 Madd. Ch. Pr. 139; Hilton v. Lord Scarborough, 2 Eq. Abridg. 171, pl. 2; Mitf. Eq. by Jeremy, 148.

² See Trustees of Huntington v. Nicoll, 3 Johns. R. 589, 590, 591, 595, 602; Alexander v. Pendleton, 8 Cranch, 462, 468; Com. Dig. Chancery, D. 13; Earl of Bath v. Sherwin, Prec. Ch. 261; S. C. 10 Mod. R. 1; Mitf. Eq. Pl. by Jeremy, 143, 144; Eden on Injunct. ch. 16, p. 356; Eldridge v. Hill, 2 Johns. Ch. R. 281, Lord Redesdale thus describes this jurisdiction: "In many cases the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus, actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and, after repeated trials, and satisfactory determination of questions, have granted perpetual injunctions to restrain further litigation; and thus have in some degree put that restraint upon litigation, which is the policy of the common law in the case of real actions." Mitford, Eq. Pl. by Jeremy, 143, 144.

Peace, and this was only a suit between A. and B., and one man is able to contend against another. But his decision was overruled by the House of Lords, and a perpetual injunction was decreed upon the ground that it was the only adequate means of suppressing oppressive litigation and irreparable mischief.¹ And this doctrine has ever since been steadily adhered to. However, courts of equity will not interfere in such cases before a trial at law; nor until the right has been satisfactorily established at law. But, if the right is satisfactorily established, it is not material what number of trials have taken place, whether two only, or more.²

§ 860. These seem to be the only classes of cases in which Bills of Peace, technically so called, will lie.³ But there are other cases bearing a close analogy to them, in which a like relief is granted; as, for instance, cases of confusion of boundaries, which, however, require some superinduced equity; and cases of quit-rents, where the remedy at law is either lost or deficient.⁴ Cases of mines and collieries may also be mentioned, where courts of equity will entertain bills in the nature of bills *Quia timet*, and Bills of Peace, where there is danger that the mine may be ruined in the mean time, before the right can be established; and upon such a bill the court will grant an adequate remedy by quieting the party in the enjoyment of his right, by restoring things to their old condition, and by establishing the right by a decree.⁵

¹ *Earl of Bath v. Sherwin*, Prec. Ch. 261; S. C. 10 Mod. 1; S. C. 1 Bro. Parl. Cas. 266, 270 [2 Bro. Parl. Cas. by Tomlins, 217]; *Leighton v. Leighton*, 1 P. Will. 671, 672; *Trustees of Huntington v. Nicoll*, 3 Johns. Rep. 566, 589, 590, 591, 595, 601, 602; Mitf. Eq. Pl. by Jeremy, 143, 144; Gilb. Forum Roman. 195.

² *Devonsher v. Newenham*, 2 Sch. & Lefr. 208, 209; *Leighton v. Leighton*, 1 P. Will. 671, 672; *Tenham v. Herbert*, 2 Atk. 483; *Earl of Darlington v. Bowes*, 1 Eden, R. 270, 271, 272; *Eden on Injunctions*, ch. 16, p. 354, 355; *Eldridge v. Hill*, 2 Johns. Ch. R. 281, 282; *Weller v. Smeaton*, 1 Cox, R. 102; S. C. 1 Bro. Ch. R. 573; *Alexander v. Pendleton*, 8 Cranch, R. 462, 468. [* See *Patterson v. McCamant*, 28 Mo. (7 Jones), 210.]

³ *Eldridge v. Hill*, 2 Johns. Ch. R. 281, 282.

⁴ *Eden on Injunctions*, ch. 16, p. 361, 362; *Ante*, § 622, 684, 686; Com. Dig. Chancery, D. 13.

⁵ *Falmouth (Lord) v. Innys*, Moseley, R. 87, 89; *Post*, § 929. See, also, *Alexander v. Pendleton*, 8 Cranch, R. 462, 468. In *Bush v. Western*, Prec. Ch. 530, the plaintiff had been in possession of a watercourse upwards of sixty years, and the defendant claimed the land through which the watercourse ran, under a fore-

Other cases, also, where the object of the bill is to prevent vexatious suits, will occur under the head of Injunctions.¹

CHAPTER XXIII.

INJUNCTIONS.

- [* § 861. Injunctions are restrictive and mandatory.
- § 862. Extend to all classes of jurisdiction. Injunction bills.
- § 863. Special prayer. Rest in discretion.
- § 864. This is exclusively a matter of equity jurisdiction.
- § 865. Injunctions similar to the interdicts of the civil law.
- § 866–868. Definition of the interdicts of the civil law.
- § 869, 870. History of this form of redress in England, Ireland, and Rome.
- § 871. Only the more common occasions of its use to be treated of.
- § 872. Mr. Eden's definition of its exercise.
- § 873. Enumeration of the different forms of injunction.
- § 874. The jurisdiction strenuously resisted, but now firmly established.
- § 875. The writ has no control over the common-law courts.
- § 876, 876 *a*. Will restrain the collection of judgments already satisfied.
- § 877. Without this power equity would fail of its chief benefit.
- § 878. Interference in case of accident.
- § 879. Illustration of judgment recovered on mistaken evidence.
- § 880. The case of fraud in enforcing an unjust judgment.
- § 881. Where discovery indispensable, injunction granted.
- § 882. Enumeration of cases where injunctions are granted.
- § 883. Equity will enjoin a suit against a surety discharged.
- § 884. So also in marshalling assets, and securities, &c.
- § 885. Will interfere where one gains unjust advantage at law.
- § 886. Injunction granted at all stages, of suits at law.
- § 887. Judgment against good conscience may be enjoined.
- § 888. Bill for new trial granted on same grounds as bills of review.
- § 889. Will compel the party to elect in what form he proceeds.
- § 890. Will require creditors to acquiesce in remedy by creditor's bill.
- § 890 *a*. Will not enjoin an action unless there is good defence.
- § 891. Will protect its own officers from process of other courts.
- § 891 *a*. Will not allow its officers to sue in other courts.
- § 892. Injunctions are common and special.
- § 893. Equity will not enjoin criminal proceedings, &c.

closed mortgage. The defendant obstructed the watercourse, and the plaintiff brought a bill for an injunction to quiet his, the plaintiff's possession, and it was held maintainable notwithstanding there was a remedy at law, and the title had not been established at law.

¹ *Post*, § 925, 926, 927, 928, 929, 930.

- § 894. Will not re-examine a question decided at law.
- § 895. Will not relieve the party from the consequence of laches.
- § 895 *a.* Even if they occur in a foreign forum.
- § 896. Will not reform injustice caused by negligence.
- § 897. Will not relieve the party from mistakes in pleading.
- § 898. Grounds upon which equity enjoins suits in other courts.
- § 899. May enjoin party from proceeding in foreign court.
- § 900. But not as between state and national tribunals.
- § 901. Equity will restrain vexatious litigation.
- § 901 *a.* Multiplicity of suits, at law, ground of equity jurisdiction.
- § 902. Will protect a party from relitigating decision of foreign court.
- § 903. Will restrain defendant from unconscientious use of technicality.
- § 904. Or plaintiff from similar pursuit of legal claim.
- § 905. Injunctions against the alienation of property.
- § 906. Against transferring negotiable instruments.
- § 907. So too against the transfer of stock and other valuables.
- § 908. To restrain conveyances *pendente lite*.
- § 909-911. Remedy for waste at common law.
- § 912. Remedy in equity more extensive.
- § 913. Cases of purely equitable interference.
- § 914. In cases where the title is merely an equitable one.
- § 915. Cases of equitable waste.
- § 916. Tenants in common, parceners, and joint tenants.
- § 917. Equity restrains permissive, and takes account of past, waste.
- § 918, 918 *a.* Extends to waste committed by disseizors.
- § 919. Recapitulation of instances of equitable interference.
- § 920. Nuisances, public and private.
- § 921. Public nuisance and purpresture.
- § 922. Purpresture as distinguished from nuisance.
- § 923. Public nuisance remediable in equity.
- § 924. Advantages of equitable relief in such cases.
- § 924 *a.* Equity will not enjoin nuisances upon doubtful grounds.
- § 925. The mischief must be obvious and oppressive, &c.
- § 925 *a.* Illustrations of the application of the rule.
- § 925 *b.* Nuisance is a question to be settled at law, ordinarily.
- § 925 *c.* Temporary nuisance will not be enjoined.
- n.* Testimony of the persons injured must be had.
- § 925 *d.* The want of proper distinction between law and equity in America.
- § 925 *e.* Equity will not enforce covenants for quiet enjoyment by injunction.
- § 925 *f.* Important case in New Hampshire, defining extent of equity jurisdiction in nuisance.
- § 925 *g.* Case of injunction to restrain acts in violation of covenant.
- § 925 *h.* How far public bridges may become nuisances.
- § 926. Restrains party from darkening neighbors' lights.
- § 926 *a.* And from building in violation of contract.
- § 927. Will enjoin against violation of other similar rights.
- § 927 *a.* Extent of the right to lateral support of one's soil.
- § 928. Will restrain repeated trespasses of a grievous character.
- § 929. Illustrations of the application of the rule.
- § 929 *a.* Damage to land adjoining street.
- § 929 *b.* Consideration of many recent cases bearing on the point.

§ 929 *c.* The owner of an ancient window may claim perfect immunity from all interference with his light.

§ 929 *d.* How far one can prescribe for continuing what was originally a nuisance.

§ 929 *e.* Equity jurisdiction in regard to watercourses.

§ 930. Protection of patents and copyrights by injunction.

§ 931, 932. Action at law a wholly inadequate remedy.

§ 933. Equity prevents future injury, and compels account of past.

§ 934. Will not interfere until right established, at law, or by time.

§ 935. Same course pursued as to copyrights.

§ 936. Will not protect immoral, irreligious, or scandalous works.

§ 937. This is upon the ground that illegal matters have no *status* in courts of justice.

§ 938. Courts of equity will not determine questions of theology, &c.

§ 939. How far an abridgment, extracts, &c., are allowable.

§ 940. To what extent one author may avail himself of the aid of others.

§ 941. The extent of variation in the books is determined by the master.

§ 941 *a.* What will be a proper use of a work protected by copyright.

§ 941 *b.* The interest of publishers in copyrights, not assignable.

§ 942. It is no objection to an injunction against publication that parts of it are not within the prohibition.

§ 943. Injunctions to restrain the publication of manuscripts.

§ 944. So also of letters in the hands of those to whom addressed.

§ 945. The literary property of such letters remains in the author.

§ 946 - 948. The same rule should be applied to all private letters.

§ 948 *a.* Equity interferes by injunction only to protect literary property.

§ 949. One may be restrained from publishing oral lectures.

§ 950. And from using plays performed at a theatre.

§ 951. Equity will restrain the use of another's trade-marks.

§ 951 *a.* So also from using a song upon the credit of another.

§ 951 *b.* To what extent trade-marks will be protected.

§ 951 *c.*, 951 *d.* The ground of such injunction, fraud and damage.

§ 952. Equity will restrain from the use of confidential secrets.

§ 953. Will restrain the conveyance of real estate.

§ 954, 955. Or making any change in the state of property, pending litigation.

§ 955 *a.* Will not control legal discretion unless abused.

§ 956. Will enforce duty to subsequent owners.

§ 957. Will protect property in ships, and in timber cut down.

§ 957 *a.* Will aid suitor in foreign court.

§ 957 *b.* How far, and in what mode, courts of equity interfere in regard to matters out of the jurisdiction of the forum.

§ 957 *c.* Injunctions against proceedings abroad, in contravention of the domestic insolvent laws.

§ 958. Will enforce covenants where no adequate remedy at law.

§ 958 *a.* Will not ordinarily enforce a part of a contract by injunction.

§ 959. Injunctions often used to effect specific redress.

§ 959 *a.* Will only be granted in exercise of just discretion.

§ 959 *b.* Courts decline to define the limits of the remedy.

§ 959 *c.* Court of equity liquidates damages for breach of injunction.

§ 959 *d.* Will protect burial-places by injunction.

§ 959 *e.* How far the court will enforce the stipulations of a contract by way of injunction.

§ 959 *f.* How far injunctions may affect foreign sovereigns, and foreign corporations and contracts.

§ 959 *g.* Courts of equity will not enforce a contract, legal by the *lex loci contractus*, if contrary to the policy of the forum.

§ 959 *h.* How far courts of equity will regard rights depending on foreign sovereignty.]

§ 861. A WRIT OF INJUNCTION may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing,¹ according to the exigency of the writ.² The most common form of injunctions is that which operates as a restraint upon the party in the exercise of his real or supposed rights; and is sometimes called the remedial writ of injunction. The other form commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same; as, for instance, it may contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land, or other property, which constitutes the subject-matter of the decree in favor of the other party.³

¹ [It seems a court of equity has no power to order a party to undo what he has done. *Bradbury v. The Manchester, Sheffield and Lincolnshire Railway Co.* 8 Eng. Law & Eq. R. 143. Unless after a decree; in which case the injunction becomes a judicial process. *Washington University v. Green*, 1 Md. Ch. Dec. 97.]

² *Gilb. Forum Roman.* ch. 11, p. 192, &c.; *Eden on Injunct.* ch. 14, p. 290, &c.; 1 *Wooddes. Lect.* 7, p. 206. It has been remarked by Mr. Eden, that wherever a plaintiff appears entitled to equitable relief, if it consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers that relief by injunction. In many cases it enforces it by means of the process of a writ of injunction, properly so called. But he proceeds to remark: "But as the known forms of that remedy are by no means adapted to every case, in which the court has jurisdiction to interpose, the prohibition has, in numerous cases, been issued and conveyed in the shape merely of an order in the nature of an injunction. And as the court treats the neglect or disobedience of all orders as a contempt, and enforces the performance of them by imprisonment, the object sought is equally attained by an order of this nature as by a writ. The distinction is consequently disregarded in practice, and these orders, though not enforced by means of the writ of injunction, have indiscriminately obtained the name of injunctions." *Eden on Injunct.* ch. 14, p. 290.

³ *Eden on Injunct.* ch. 1, p. 1, 2; 3 *Wooddes. Lect.* 56, p. 397; *Jeremy on Equity Jurisd.* B. 3, ch. 2, § 1, p. 308, &c.; *Gilb. Forum Roman.* ch. 11, p. 194, 195; *Stribley v. Hawkie*, 3 Atk. R. 275; *Huguenin v. Baseley*, 15 Ves. 179. This is the distinction stated by Mr. Eden in his excellent Treatise on Injunctions (ch. 1, p. 1, 2), a work of which I have made constant use in this chapter. But it may be doubted if the appellation *judicial writ* is not strictly applicable to all writs of

§ 862. The object of this process, which is most extensively used in equity proceedings, is generally preventive and protective, rather than restorative; although it is by no means confined to the former.¹ It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive and to its auxiliary jurisdiction.² It is treated of, however, in this place, principally, because it forms a broad foundation for the exercise of concurrent jurisdiction in equity. In cases, calling for such redress, there is always a prayer in the bill for this process and relief; and hence, bills of this sort are commonly called injunction bills.³

§ 863. Indeed, unless an injunction is specifically prayed for by the bill, it is the settled practice not to grant this remedial process; because (it has been said) the defendant might make a different case by his answer against the general words of the bill, from what he would have done against the specific prayer for an injunction.⁴ This, at least, constitutes an exception from the general doctrine, as to the efficacy of the prayer for general relief.⁵ The granting or refusal of injunctions is, however, a matter resting in the sound discretion of the court; but injunctions are now more liberally granted than in former times.⁶

injunction; since they are not writs of course, but are specially ordered by the court after the suit is instituted upon a hearing of the matter. The description of the writ by Mr. Jeremy seems sufficiently accurate. "An injunction," says he, "is a writ, framed according to the circumstances of the case, commanding an act, which this court regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience." (Jeremy on Eq. Jurisd. ch. 2, § 1, p. 307.) If one were disposed to be scrupulously critical on such a subject, he might object to the apparent contrast between justice in the first part of the sentence, and equity and good conscience in the latter. The truth is that, in this connection, the words have the same identical meaning. See 1 Madd. Ch. Pr. 104, 105, 106.

¹ Com. Dig. Chancery, D. 11, 13; Gilb. Forum Roman ch. 11, p. 192, 194.

² Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 308.

³ Mitford, Eq. Pl. by Jeremy, 47; Story on Equity Plead. § 41.

⁴ Savory v. Dyer, Ambl. R. 60; Eden on Injunct. ch. 3, p. 48, 49; Id. ch. 15, p. 321; Cooke v. Martyn, 2 Atk. 3; Grimes v. French, 2 Atk. 141; Dormer v. Fortescue, 3 Atk. 131; Manaton v. Molesworth, 1 Eden, R. 26; 2 Madd. Ch. Pr. 173; Story on Equity Plead. § 41.

⁵ Ibid.

⁶ 1 Madd. Ch. Pr. 104.

§ 864. The writ of injunction is peculiar to courts of equity, although there are some cases where courts of law may exercise analogous powers ; such as by the writ of prohibition and estrepement in cases of waste.¹ The cases, however, to which these legal

¹ In the case of *Jefferson v. The Bishop of Durham* (1 Bos. & Pull. 105, 120 to 132), the subject of these remedies in courts of law, in cases of waste, is very learnedly discussed. A single passage from the opinion of Lord Chief Justice Eyre may serve to explain them, and show their inadequacy, as a remedy. "The state of the common law," said he, "with respect to waste, has been so fully laid open by the bar, that I need do little more than allude to it. At common law, the proceeding in waste was by writ of prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered. But if that was not obeyed, and an alias and pluries produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment which was and is the foundation of all the proceedings in prohibition, and of many other proceedings in this court at this day. Si A. B. fecerit te securum, &c., tunc pone, &c., quod sit coram justiciariis nostris, &c., ostensura, quarefecit vastam, &c., contra prohibitionem nostram, &c. That writ being returnable in a court of common law, and most usually in a court of common pleas, on the defendant appearing, the plaintiff counted against him ; he pleaded ; the question was tried ; and, if the defendant was found guilty, the plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said (and truly so, I think, so far as can be collected from the text-writers), that, at the common law, this proceeding lay only against tenant in dower, tenant by the courtesy, and guardian in chivalry. It was extended by different statutes to farmers, tenants for life, and tenants for years, and, I believe, to guardians in socage. That which these statutes gave by the way of remedy was not so properly the introduction of a new law, as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act, which introduced anything substantially new, was that which gave a writ of waste or estrepement pending the suit. It follows, of course, that this was a judicial writ, and was to issue out of the courts of common law. But, except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text-writers, that any prohibition could issue from those courts. By the stat. of West. 2, the writ of prohibition from the chancery, which existed at common law, is taken away, and the writ of summons substituted in its place. And, although it is said by Lord Coke, when treating of prohibitions at the common law, that it 'may be used at this day,' those words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the posse comitatus to prevent the commission of waste intended to be done. The writ directed to the party was certainly taken away by the statute. At least as far as my researches go, no such writ has issued, even from chancery, in the common cases of waste by tenant in

processes are applicable are so few, and so utterly inadequate for the purposes of justice, that the processes themselves have fallen into disuse; and almost all the remedial justice of this sort is now administered through the instrumentality of courts of equity.¹ The jurisdiction in these courts, then, has its true origin in the fact, that there is either no remedy at all at law, or the remedy is imperfect and inadequate. The jurisdiction was for a long time most pertinaciously resisted by the courts of common law, especially when it was applied by an injunction to stay suits and judgments in these courts.² But it was firmly established in the reign of King James the First, upon an express appeal to that monarch; and it is now in constant and unquestioned exercise.³

§ 865. It has been justly remarked by an eminent civilian, that injunctions, issued by the courts of equity in England, partake of the nature of interdicts according to the Roman law.⁴ The term *interdict* was used in the Roman law in three distinct, but cognate senses. It was, in the first place, often used to signify the edicts made by the prætor declaratory of his intention to give the remedy in certain cases, chiefly to preserve or to restore possession. And hence such an interdict was called edictal: *Edictale, quod prætoris edictis proponitur, ut sciant omnes eâ formâ posse implorari*. Again, it was used to signify his order or decree, applying the remedy in the given case before him; and then it was called decretal; *Decretale, quod prætor pro re natâ implorantibus decrevit*. And in the last place, it was used to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself.⁵

§ 866. It is in the second sense above stated, that the interdict of the Roman law bears a resemblance to the injunction of courts

dower, tenants by the courtesy, and guardians in chivalry, tenants for life, &c., &c., since it was taken away by the stat. of West. 2. Thus the common-law remedy stood with the alteration above mentioned, and with the judicial writ of *estrepement introduced pendente lite*."

¹ Eden on Injunct. ch. 9, p. 158, 159, 160; 3 Wooddes. Lect. 56, p. 399; Com. Dig. Chancery, D. 11.

² 3 Wooddes. Lect. 56, p. 398; 1 Wooddes. Lect. 6, p. 186; 1 Ch. Rep. App.; Eden on Injunct. ch. 3, p. 135.

³ Ibid.; 3 Wooddes. Lect. 56, p. 398.

⁴ Halifax, Roman Civil Law, ch. 6, p. 102.

⁵ Livingston on the Batture case, 5 American Law Journal, 271, 272; Brisson de Verb. Sig. *interdictum*; Vicat. Vocab. *Interdictum*; Heineccii, Elem. Pand. Ps. 6, § 285, 286.

of equity. It is said to have been called interdict because it was originally interposed in the nature of an interlocutory decree between two parties, contending for possession, until the property could be tried. But afterwards the appellation was extended to final decretal orders of the same nature. In the Institutes, interdicts are thus defined: Interdicts were certain forms of words, by which the prætor either commanded or prohibited something to be done; and they were chiefly used in controversies respecting possession, or *quasi* possession. *Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid fieri, aut fieri prohibebat. Quod tunc maxime fiebat, cum de possessione, aut quasi possessione, inter aliquos contendebatur.*¹ They were divided into three sorts, prohibitory, restitutory, and exhibitory interdicts. Prohibitory were those by which the prætor forbade something to be done, as when he forbade force to be used against a lawful possessor; restitutory, by which he directed something to be restored, as when he commanded possession to be restored to any one, who had been ejected from the possession by force; exhibitory, by which he ordered a person or thing to be produced.² After this definition or description of the various sorts of interdicts, the Institutes proceed to state that some persons nevertheless have supposed that those only can be properly called interdicts which were prohibitory; because to interdict is properly to denounce and prohibit; and that the restitutory and exhibitory interdicts should properly be called decrees. But that by usage they are all called interdicts, because they are pronounced between two persons. *Sunt tamen, qui patent, propriè interdicta ea vocari, quæ prohibitoria sunt, quia interdicere sit denuntiare et prohibere; Restitutoria autem et exhibitoria, propriè decreta vocari. Sed tamen obtinuit, omnia interdicta appellari, quia inter duos dicuntur.*³

§ 867. Another division of interdicts in the Roman law was into those which were (1.) to gain or acquire possession; or (2.) to retain possession; or (3.) to recover possession.⁴ And again, another division was into those which were (1.) single, in which

¹ Inst. Lib. 4, tit. 15; Introd.

² Inst. Lib. 4, tit. 15, § 1; Heinecc. Elem. Pand. Ps. 6, Lib. 43, § 285, 286, 287; Halifax on Civil Law, ch. 6, p. 101; Dig. Lib. 43, tit. 1, l. 1, 2; Pothier, Pand. Lib. 43, tit. 1, § 1 to 16; Vicat. Vocab. voce, *interdictum*.

³ Inst. Lib. 4, tit. 15, § 1.

⁴ Inst. Lib. 4, tit. 15, § 2, 3, 4; Halifax on Roman Law, ch. 6, p. 101.

each of the litigant parties sustained one character, that of plaintiff or *actor*, or defendant or *reus*; or (2.) double, in which each of the litigant parties sustained two characters, that of plaintiff or *actor*, and that of defendant or *reus*.¹

§ 868. From this summary account of the Roman interdicts, which were, after a time, superseded by what were called extraordinary actions, in which judgment was pronounced without any antecedent interdict, and in the same manner as if a beneficial action had been given in consequence of an interdict,² it is easy to perceive that they partake very much of the nature of injunctions in courts of equity, and were applied to the same general purposes; that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the permanent enjoyment of the rights of property.

§ 869. In the early course of chancery proceedings, injunctions to quiet the possession of the parties before the hearing were indiscriminately granted to either party, plaintiff or defendant, in cases where corporeal hereditaments were the subject of the suit; the object of them being to prevent a forcible change of possession by either party pending the litigation.³ These injunctions bore a very close resemblance to the interdict, *Uti possidetis*, of the Roman law, which was granted to either party in a suit, who was then in possession, in order that he might be secured therein as the legal possessor during the litigation.⁴ *Hoc interdictum (Uti possidetis) de soli possessore scriptum est, quem potiores prætor in soli possessione habebat; et est prohibitorium ad retinendam possessionem.*⁵ *Est igitur hoc interdictum, quod vulgò Uti possidetis appellatur, retinendæ possessionis; nam hujus rei causâ redditur, ne vis fiat, ei, qui possidet.*⁶ *Hoc interdictum duplex est; et hi, quibus competit, et actores et rei sunt.*⁷

¹ Inst. Lib. 4, tit. 15, § 7; Halifax on Roman Law, ch. 6, p. 101.

² Inst. Lib. 4, tit. 15, § 8.

³ Eden on Injunctions, ch. 16, p. 332 to 334; 2 Collect. Jurid. 196; Beames, Ord. ch. 15, and note (49). One of Lord Bacon's Ordinances (26) is, that "Injunctions for possession are not to be granted before a decree; but where the possession hath continued by the space of three years before the bill exhibited; and upon the same title, and not upon any title by leave, or otherwise determined." Beames, Ord. ch. 15. This was probably the origin of the Chancery Proceedings in Ireland stated in the text; *Post*, § 870.

⁴ Halifax on Roman Law, ch. 6, p. 101, 102.

⁵ Dig. Lib. 43, tit. 17, l. 1, § 1.

⁶ Dig. Lib. 43, tit. 17, l. 1, § 4.

⁷ Dig. Lib. 43, tit. 17, l. 3, § 1. Proceedings analogous to those in the Roman law are recognized in the Scottish jurisprudence; *Ersk. Inst.* p. 764, § 47.

§ 870. The practice of granting injunctions of this sort has (it is said) become obsolete in England, if not altogether, at least in so great a degree that there are few instances of it in modern times.¹ But injunctions of the nature of an interdict, *Unde vi*, of the Roman law, to restore a possession, from which the party has been forcibly ejected, are, under the name of possessory bills, said to be still common in Ireland.² The interdict, *Unde vi*, in the Roman law, was granted to restore a possession forcibly taken away; whereas, the interdict, *Uti possidetis*, was granted to preserve a present possession. *Illud (interdictum unde vi)*, says the Digest, *enim restituit vi amissam possessionem; hoc (interdictum uti possidetis) tuetur, ne amittatur possessio. Denique prætor possidenti vim fieri vetat; et illud quidem interdictum oppugnat possessorem; hoc tuetur.*³

§ 871. It is obviously incompatible with the object of these Commentaries to enumerate in detail (even if such a task were practicable) the various cases in which a writ of injunction will be granted in courts of equity. Many cases of this sort have already been incidentally taken notice of in the preceding pages; and others again will occur hereafter. What is proposed to be done in this place is, to enumerate some only of the more common cases, in which it is applied, rather as illustrations of the nature and extent of the jurisdiction, than as a complete analysis of it.

§ 872. A learned writer, whose work on this subject is in high estimation, has enumerated, among the most ordinary objects of

¹ Eden on Injunct. ch. 16, 333, 334; *Hughes v. Trustees of Modern College*, 1 Ves. 188, 189; Anon. 2 Ves. 415. In America, injunctions of this sort are not without precedent. Thus, in *Varick v. Corporation of New York* (4 Johns. Ch. R. 53), Mr. Chancellor Kent granted an injunction against the corporation (until they should have established their right at law), to prevent them from digging into the soil and throwing down the fences of a close, which the plaintiff had possessed for twenty-five years, the acts being done by the corporation under the claim of its being a public highway. The case is a good deal like that of *Hughes v. Trustees of Modern College*, 1 Ves. 188. Why may not cases of this sort be properly referable to the doctrine of irreparable mischief, or to prevent multiplicity of suits? See *Belknap v. Belknap*, 2 Johns. Ch. R. 463; *Agar v. Regent's Canal Company*, Coop. Eq. R. 77; *Shand v. Aberdeen Canal Co.* 2 Cow. R. 519.

² Eden on Injunct. ch. 16, p. 334; 2 Brown, Parl. Cas. by Tomlins, 28; Anon. 2 Ves. 415.

³ Dig. Lib. 43, tit. 17, l. 1, § 4; Halifax on Roman Law, ch. 6, p. 102.

the remedial writ of injunctions, the following: "To stay proceedings in courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, or from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse, which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation." But he immediately adds: "These, however, are far from being all the instances, in which this species of equitable interposition is obtained. It would, indeed, be difficult to enumerate them all; for in the endless variety of cases, in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction."¹

§ 873. The illustrations of the jurisdiction which will be attempted in our pages, will be principally limited to cases of injunctions to stay proceedings at law; to restrain vexatious suits; to restrain the alienation of property; to restrain waste; to restrain nuisances; to restrain trespasses; and to prevent other irreparable mischiefs. We shall then add some few instances of special injunctions, in order more fully to develop the nature and extent of this most beneficial process of preventive and remedial justice. It should be premised, however, that injunctions, when granted on bills, are either temporary, as until the coming in of the defendant's answer; or until the further order of the court; or until the hearing of the cause; or until the coming in of the report of a master; or they are perpetual, as when they form a part of the decree after the hearing upon the merits, and the defendant is

¹ Eden on Injunct. ch. 1, p. 1, 2. See also 1 Madd. Ch. Pr. 106.

perpetually inhibited from any assertion of a particular right, or perpetually restrained from the doing of a particular act.¹

§ 874. Injunctions to stay proceedings at law² are sometimes granted to stay trial; or, after verdict, to stay judgment; or, after judgment, to stay execution; or, if the execution has been effected, to stay the money in the hands of the sheriff; or, if part only of the judgment debt has been levied by a *fieri facias*, to restrain the suing out of another *fi. fa.*, or a *ca. sa.*, according to the exigency of the particular case.³ This jurisdiction of granting injunctions, in an especial manner, met the decided opposition and hostility of the courts of common law, from a very early period of the exercise of equity jurisprudence. The common mode in which this relief was granted, was after a judgment at law, by enjoining the plaintiff not to sue out execution upon the judgment.⁴ This was supposed to trench upon the jurisdiction of the courts of common law, from its tendency to destroy their conclusiveness, and to make nullities of their judgments; since an execution is properly said to be *fructus, finis, et effectus legis*; and, therefore, is the life of the law.⁵ The exercise of this jurisdiction, however, can be distinctly traced back to the beginning of the reign of Henry the Seventh;⁶ and although it was constantly struggled against, and even constituted one of the articles of impeachment against Cardinal Wolsey, in the reign of Henry the Eighth; yet it was constantly upheld by the chancellors, and was finally and conclusively established in the reign of King James, in the manner already mentioned.⁷

§ 875. There does not seem to be any just foundation for the opposition of the courts of common law to this jurisdiction. A writ of injunction is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed

¹ See 3 Wooddes. Lect. 56, p. 416; Gilb. Forum Roman. ch. 11, p. 194, 195.

² [As to the principles upon which a court of chancery acts in such cases, see *Dalglish v. Jarvie*, 2 Mac. & Gord. 231; 2 Hall & Twells, 437.]

³ 3 Wooddes. Lect. 56, p. 406; *Post*, 886.

⁴ 1 Wooddes. Lect. 6, p. 186; 3 Wooddes. Lect. 56, p. 398, 406.

⁵ Bac. Abr. *Execution*, A.; Co. Litt. 289, b.

⁶ 1 Rep. Ch. App. 1, 21 (edit. 1715); 1 Wooddes. Lect. 6, p. 186; 3 Wooddes. Lect. 56, p. 398; 4 Co. Inst. 92.

⁷ *Ante*, § 51, 862.

only to the parties. It neither assumes any superiority over the court, in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the court of equity, granting the process, has cognizance, it is against conscience, that the party inhibited should proceed in the cause.¹ The object, therefore, really is, to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury, which is wholly irremediable by a court of law.²

§ 876. One of the plainest cases which can be put of the propriety of granting an injunction to a judgment at law, is where it has been in fact satisfied, and yet the judgment creditor attempts to set it up, and enforce it, either against the judgment debtor, or against some person claiming under him,³ who is thereby injured in his property or rights.⁴ [So, if such judgment has not been satisfied, but the creditor has made promises to the debtor never to enforce it, upon the strength of which the debtor has contracted irrevocable engagements.⁵] In such cases a court of law would often be exceedingly embarrassed in giving the proper redress, if it could give it at all. But courts of equity deal with it at once, and apply the most complete remedial relief.

[* § 876 *a*. Where property attached upon a writ of mesne process was bailed for safe-keeping by the sheriff, and the debt subsequently paid by the debtor, but not until after final judgment had been recovered against the bailee of the property attached, and the creditors nevertheless attempted to enforce the judgment against the bailee, it was held to be substantially the same as if the judgment against the bailee had been paid, that being merely collateral to the principal debt must fall with it, and its collection was accordingly enjoined.⁶ So where, by mistake, accident, or

¹ Eden on Injunct. ch. 2, p. 4. See *Richardson v. Baltimore*, 8 Gill, 433.

² Mitford, Eq. Pl. by Jeremy, p. 127, 128, 131.

³ [So a creditor by a second execution may obtain an injunction against a creditor of the same party by a prior execution who has in fact been paid, but threatens to levy on the debtor's land, and thus prevent the collection of the second execution. *Shaw v. Dwight*, 16 Barbour, 536.]

⁴ *Brinckerhoff v. Lansing*, 4 Johns. Ch. R. 65, 73.

⁵ *Money v. Jorden*, 11 Eng. Law & Eq. R. 182; 13 Id. 245, on appeal.

⁶ [* *Paddock v. Palmer*, 19 Vt. R. 581; *S. P. Keighler v. Savage Manuf. Co.* 12 Md. R. 383.

fraud, judgment has been entered for an amount, or in terms, not intended, equity will, on clear proof, give relief.^{1]}

§ 877. Indeed, without a jurisdiction of this sort, to control the proceedings, or to enjoin the judgments of parties at law, it is most obvious that equity jurisprudence, as a system of remedial justice, would be grossly inadequate to the ends of its institution. In a great variety of cases, courts of law cannot afford any redress to the party sued, although it is most manifest that he has in conscience and justice, but not at law, a perfect defence. He may be deprived of his rights by fraud, or accident, or mistake. Nay, the very facts on which he relies may be exclusively within the knowledge of the party who sues him, and without a discovery (which a court of law cannot grant) he may be unable to establish his defence; and, if proceedings cannot in the mean time be stayed at law, until a discovery can be had in equity, he will be subjected to intolerable oppression or injury.²

§ 878. A single case, under each of the heads of accident, mistake, and fraud, will sufficiently show the beneficial operation, nay, the necessity of the interposition of courts of equity, to restrain proceedings at law under circumstances of the most simple character. Suppose an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire a great portion of them should be destroyed, so that the estate should be deeply insolvent. In such a case he might be sued by a creditor at law, and the loss of the assets by accident would be no defence; for when he once becomes chargeable with the assets at law, he is forever chargeable notwithstanding any intervening casualties. But courts of equity will enjoin proceedings at law, in cases of this sort, upon the purest principles of justice.³

¹ *Katz v. Moore*, 13 Md. R. 566.]

² *Mitford*, Eq. Pl. by *Jeremy*, p. 127, 128, 130. Mr. Eden has collected under this head many cases of accident, mistake, fraud, account, illegal and immoral contracts, penalties, and forfeitures, breaches of covenants, decrees for the administration of assets, election of remedies at law or in equity, marshalling of securities, discharge of sureties, &c., where an injunction is the appropriate remedy; and to this work, and the authorities there cited, the learned reader is referred for more full information. *Eden on Injunctions*, ch. 2, p. 3 to 44. See, also, 1 *Madd. Ch. Pr.* 109, 110.

³ See *ante*, § 90; *Crosse v. Smith*, 7 East, 246; *Croft's Executors v. Lyndsey*, 2 Freem. R. 1.

§ 879. Suppose a party is sued at law for a debt of long standing, and a judgment is obtained against him for the amount, although he has actually paid it; but he is unable, after due search, to find a receipt or release, which would establish the fact; and then, after judgment, the paper is unexpectedly found, either in his own possession, or in that of a third person. At law, there would be no redress under such circumstances. The judgment would be conclusive. But a court of equity would in such a case afford relief, by a perpetual injunction of the judgment.¹ Such a suit may be brought without fraud, as by a representative of a deceased party; and therefore, it may be a case of innocent mistake.

§ 880. Suppose a judgment should be obtained at law, by fraud, for a sum larger than is justly due to the party, upon a mutual understanding of the parties, that certain set-offs should be allowed and deducted. There would be no remedy at law; and yet a court of equity would not hesitate to enjoin the judgment upon due proof, to the extent of the set-offs. Or, suppose a party were surprised at the trial by proof of a claim, of which, from the nature of the declaration, he could have no notice, and was in no default; and thus a recovery should be had for an amount not legally due; the like relief would be granted in equity. But at law, the party might be utterly without redress; for he might not be able to bring the case within the ordinary rules for granting a new trial.²

§ 881. Another case may easily be supposed, where the defendant at law has a perfect defence, but where the facts upon which it depends are exclusively within the knowledge of the plaintiff in the suit. In such a case, a bill of discovery is indispensable to enable the party to make good his defence at law. But if, in the mean time, the plaintiff were permitted to go on at law, and to insist upon a trial before the discovery was obtained, it is obvious that the law would be an instrument of the grossest injustice. In such a case a court of equity would decree an injunction to stay proceedings, until the discovery was duly obtained.³

¹ *Gainsborough v. Gifford*, 2 P. Will. 424. [* This seems questionable unless the defendant failed of making defence at law by reason of the fraud of the plaintiff.]

² This last illustration is perhaps rather questionable; since allowing redress, in such a case, in a court of equity, is nothing less than revising the decision of the court of law in denying the new trial. *Post*, § 1574.]

³ See *Eden on Injunct.* ch. 2, p. 3, &c.; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 340, 341.

§ 882. In some of the cases, which have been above supposed, the defendant would have had a complete remedy at law, if, at the time, he had been in possession of the appropriate proofs. But the great mass of cases in which an injunction is ordinarily applied for, to stay proceedings at law, is where the rights of the party are wholly equitable in their own nature or are incapable, under the circumstances, of being asserted in a court of law. A ready illustration of the former class may be found in the attempt of a trustee, in violation of his trust, to oust the possession of the *cestui que trust* of an estate, to the beneficial enjoyment of which he is entitled; or of a landlord to oust the possession of a tenant, with whom he has contracted for a lease, by an ejectment in violation of that contract; or of a party setting up a satisfied term, or an outstanding legal encumbrance, to defeat the possession of another person having in conscience and equity a better title to it. Illustrations of the latter class may be found in the common cases of bonds and mortgages, and other penal securities and covenants, where, by the strict rules of law, the party after forfeiture can obtain no relief; in cases of set-offs in equity, which are not recognized at all at law as such; and in cases of partnership property, seized in execution by a creditor of one of the partners, where an injunction will be awarded to stay proceedings, until an account of the partnership funds and rights is taken.

§ 883. It seems proper, too, in this place, to take notice of the application of this same remedial process, upon larger principles, to the case of sureties, who are often discharged from their liability, according to the doctrines of courts of equity, when they would be held responsible at law. It is well settled that, wherever a creditor, in pursuance of a valid agreement for such a purpose, gives time for payment to the principal debtor, without the consent of the surety, the latter will be held discharged in equity, although he might still be held bound at law.¹ In such a case, it is of no consequence whether the surety has sustained any actual damage or not. Nay, the arrangement may be for his benefit; and yet he will in equity be discharged; for the rights of the creditor, as to his debtor, have been voluntarily suspended, and of course the relation of the surety to both changed without his consent. Under such circumstances, the surety has a right to restrain the creditor

¹ *Ante*, § 324, 325, 326; *Clarke v. Henty*, 3 *Younge & Coll.* 187, 189. [* This defence is now equally available at law as in equity.]

from proceeding at law against him to recover the debt; and a perpetual injunction constitutes the true and effectual remedy.¹ [So, too, if a creditor fraudulently aids his principal debtor to abscond, with intent to hinder and delay a surety in his remedy against the principal to recover the sum for which he is bound for him, equity will enjoin the creditor from enforcing his claim against the surety.²]

§ 883 *a*. But the question who is to be deemed a surety in the sense of a court of equity, is very material to be considered; for although a person between himself and his co-obligor may be a surety only, yet as to the obligee both may be properly deemed principals and liable as such. And this, at law, must depend upon the very terms of the instrument itself; for no extrinsic evidence is admissible for the purpose. Thus, for example, where two persons purported on the face of a grant of an annuity to be both grantors, it was held, that, although as between themselves one might be a surety, yet, as to the grantee, both were to be deemed principals, and extrinsic evidence was not admissible to establish the fact to be different.³ Still, however, if the grantee knew that one was a surety, and he dealt with the other injuriously to the interests of the former, this might raise an equity in favor of the surety, entitling him to protection against the legal consequences of the instrument which he joined in executing.⁴ However, a surety is not necessarily discharged by a dealing between the obligee and his principal, which is unknown to him. But it must depend upon circumstances.⁵

¹ *Ante*, § 324, 326; Edén on Injunctions, ch. 2, p. 40; *Nisbet v. Smith*, 2 Bro. Ch. R. 579; *Rees v. Berrington*, 2 Ves. Jr. 540, 543, 544; *Boulton v. Stubbs*, 18 Ves. 20; *Samuel v. Howarth*, 3 Meriv. R. 272; *Eyre v. Barthrop*, 3 Madd. R. 220; *King v. Baldwin*, 2 Johns. Ch. R. 554, 560; S. C. 17 Johns. R. 384; *Tyson v. Cox*, 1 Turner & Russ. 395, 399; *Blake v. White*, 1 Younge & Coll. 420, 422, 423, 424; *Bank of Ireland v. Beresford*, 6 Dow, R. 233.

² *Smith v. Hays*, 1 Jones, Eq. R. 321.

³ *Hollier v. Eyre*, 9 Clarke & Finnel. 1, 45, 57.

⁴ *Ibid*.

⁵ *Hollier v. Eyre*, 9 Clarke & Fin. 1, 45, 57. On this occasion, Lord Cottenham said: "Lord Eldon's observations in *Ex parte Giffard* (6 Ves. 806), and in *Samuel v. Howarth* (3 Meriv. 278), must be understood with reference to the cases before him; they afford no inference that that very learned judge would have held that a surety was discharged because the principal had agreed with his creditor that only half the debt should be claimed, or only a portion of the annuity paid for the future. The surety will be left to judge for himself between his

§ 884. We might here also advert to the important branches of equity jurisprudence in the administration and marshalling of assets, and the marshalling of securities, as furnishing other appropriate illustrations of the beneficial interposition of courts of equity to control the rights and proceedings of creditors and others at law by the remedial process of injunction, upon principles almost purely of an equitable and conscientious nature. In most of the cases of this nature, there is no pretence to assert the jurisdiction upon any of the ordinary grounds of accident, mistake, fraud, or confidence. It stands upon the more enlarged principles of general justice, and was probably derived from that great reservoir of general principles, the Roman civil law, where equities of this sort were not unfrequently entertained.¹

§ 885. Indeed, the occasions on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances.² In general it may be stated, that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advan-

original undertaking and another substituted for it; but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation. In *Whitcher v. Hall* (5 Barn. & C. 281), Mr. Justice Little-dale puts the case of a surety for the rent of a tenant who was to hold one hundred acres, but by a subsequent agreement with his landlord, held only fifty; and thinks it clear that the surety would be liable. Modern cases, such as *Hulme v. Coles* (2 Sim. 12), and *Price v. Edmunds* (10 Barn. & C. 578), have put a very rational limit to the rule, that giving time to the principal discharges the surety, by holding that for that purpose such giving time must be under circumstances, which at best might be injurious to the surety. The latter case also establishes that a conditional agreement for time does not discharge the surety, when from the condition not being performed the agreement does not become binding; and in the present case it was a condition of the alteration of the arrangement that the reduced annuity should be a primary charge upon the estate, and that the title-deeds should be deposited, which condition was never performed. It is true that payment of the annuity at a reduced rate was nevertheless accepted, which it has been said was a waiver of the condition; but the contract to discharge a surety must be positive and distinct; and if the acceptance of the reduced annuity by the grantee was a waiver of the condition, the payment of it was conclusive evidence of the plaintiff's acquiescence in the arrangement under which the reduction had taken place."

¹ *Ante*, § 558, &c., 633, 635, 636, &c.; *Eden on Injunct.* ch. 2, p. 31, 32, 38, 39; *Id.* ch. 3, p. 56.

² *Wooddes. Lect.* 56, p. 407.

tage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained;¹ and it will also generally proceed to administer all the relief which the particular case requires, whether it be by a partial or by a total restraint of such proceedings. If any such unfair advantage has been already obtained by proceedings at law to a judgment, it will, in like manner, control the judgment, and restore the injured party to his original rights.²

§ 886. The injunction is not confined to any one point of the proceedings at law; but it may be granted at any stage of the suit.³ Thus, an injunction is sometimes granted to stay trial; sometimes after verdict to stay judgment; sometimes after judgment to stay execution;⁴ sometimes after execution [to restrain the sale of property illegally taken thereon,⁵ or] to stay the money in the hands of the sheriff, if it be a case of a *feri facias*; or to stay the delivery of possession, if it be a writ of possession.⁶ And the injunction may be temporary or perpetual, total or partial, qualified or unconditional.⁷

§ 887. After a judgment at law, any facts, which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident,⁸ unmixed with any fault or negligence in himself or his agents, will in general authorize a court of equity to interfere by injunction, to restrain the adverse party from availing himself of such judgment.⁹ Bills of this sort are usually called bills for a new trial.¹⁰

¹ See *Taylor v. Gilman*, 25 Verm. 411; *Kent v. Ricards*, 3 Md. Ch. Dec. 392.

² Mitf. Eq. Pl. by Jeremy, p. 127 to 133; 1 Madd. Ch. Pr. 113 to 166; 3 Wooddes. Lect. 56, p. 406 to 410; *Eden on Injunct.* ch. 2, p. 3.

³ *Ibid.*; *Eden on Injunct.* ch. 2, p. 44; *Ante*, § 874.

⁴ See *Grant v. Lathrop*, 3 Foster, 67.

⁵ *Kenyon v. Clarke*, 2 Rh. Island R. 67.

⁶ See 3 Wooddes. Lect. 56, p. 406, 407, 412, 416; 1 Madd. Ch. Pr. 109, 110; *Eden on Injunct.* ch. 2, p. 44, &c.; *Ante*, § 874.

⁷ *Ibid.*; *Ante*, § 873.

⁸ See *Fletcher v. Warren*, 18 Verm. 45; [* *Tysor v. Lutterloh*, 4 Jones, Eq. R. 247.]

⁹ *Marine Insurance Company v. Hodgson*, 7 Cranch, R. 332; *Jarvis v. Chandler*, 1 Turn. & Russ. 319; *Truly v. Wanzer*, 4 Howard, Sup. Ct. R. 142; *Emerson v. Udall*, 13 Verm. 477; *Ocean Ins. Co. v. Field*, 2 Story, R. 59.

¹⁰ Mitf. Eq. Pl. by Jeremy, 131. [* Such bills are not commonly maintained

§ 888. It has been remarked by Lord Redesdale, that bills of this description have not of late years been much countenanced.¹ In general, it has been considered, that the ground for a bill, to obtain a new trial after judgment in an action at law, must be such as would be the ground for a bill of review of a decree in a court of equity, upon the discovery of new matter.²

§ 889. Courts of equity will not only award an injunction to stay proceedings at law, but they will also, where the party is proceeding at law and in equity for the same matter at the same time, compel him to make an election of the suit, in which he will proceed, and will stay the proceedings in the other court.³ And if, after a decree in equity, a party shall proceed at law for the same matter, they will interfere by way of injunction. So, if a decree is made against a party upon the merits, and he afterwards brings a bill in a foreign court for the same subject-matter, a court of equity will grant an injunction against proceeding in such foreign suit.⁴ Indeed, wherever, after a bill is filed in equity, the party institutes a suit at law for the same matter, it is treated as a contempt of the court; for the jurisdiction has already attached in equity; and it is a gross oppression to vex another with a double suit for the same cause of action.⁵

§ 890. Another class of cases, in which injunctions are granted to proceedings at law, is where there has already been a decree upon a creditor's bill for the administration of assets. Such a decree is considered in equity to be in the nature of a judgment for all the creditors; and, therefore, if, subsequently to it, a bond creditor should sue at law, the court of equity, in which the de-

in the courts of equity in this country except in cases of fraud in obtaining the judgment. *Emerson v. Udall, supra; Post, § 1574.*]

¹ See *Carrington v. Holabird*, 17 Conn. 530.

² *Mitf. Eq. Pl.* by Jeremy, 131; *Floyd v. Jayne*, 6 Johns. Ch. R. 479; *Woodworth v. Van Buskerk*, 1 Johns. Ch. R. 432.

³ *Eden on Injunct.* ch. 2, p. 34, 35, 36, 37, 38; *Vaughan v. Welsh*, *Moseley*, R. 210; *Anon. Id.* 304; *Mocher v. Reed*, 1 B. & Beatt. 318, 319, 320; *Schoole v. Sall*, 1 Sch. & Lefr. 176; *Rogers v. Vosburgh*, 4 Johns. Ch. R. 84. There are some exceptions to this doctrine. One is, that a mortgagee may proceed on his mortgage in equity, and on his bond at law at the same time. But this right is not unqualified; for the mortgagor will not be compelled to pay upon his bond, unless secure of his title-deeds being delivered up. *Schoole v. Sall*, 1 Sch. & Lefr. 176; *Eden on Injunct.* ch. 3, p. 36; *Royle v. Wynne*, 1 Craig & Phillips, 252.

⁴ *Booth v. Leycester*, 1 Keen, R. 579; *Post, § 902.*

⁵ *Eden on Injunct.* ch. 2, p. 34 to 38.

cree is made, will, (as we have seen,) in the assertion of its jurisdiction, restrain him from proceeding in his suit.¹ The reason is, that courts of law do not take notice of a decree in equity; and therefore the court of equity is compelled to establish its jurisdiction over all the assets, and the administration thereof, by preventing creditors from going elsewhere at law to assert their rights.² An injunction, in cases of this sort, was formerly granted only upon a bill filed; but it may now be obtained upon motion after notice given to the creditor.³ And it makes no difference (it should seem) as to granting an injunction, whether the bill be brought by one or more creditors against the executor or administrator for the administration of the assets, solely on his or their own behalf, or whether it be brought on behalf of themselves and all other creditors; provided that upon such a bill a general decree is made for the benefit of all the creditors. For then it is in the nature of a judgment for all the creditors; and all are entitled to have notice, and to come in, and to prove their debts before the master.⁴

[* § 890 *a*. But to justify an injunction to restrain an action upon a matter merely pecuniary, the plaintiff must be able to satisfy the court, not only that there is a case to be tried, but that there is some probability that it will prevail. So that in an information to restrain the officers of a municipal corporation from imposing a tax, or applying the funds of the corporation, in opposing a bill in parliament, the object of which was to interfere with the sewage and drainage of the town, it was held not to be a case where success was sufficiently probable to justify an injunction to

¹ *Ante*, § 549; *Eden on Injunct.* ch. 2, p. 31; *Morrice v. Bank of England*, *Cas. Temp. Talb.* 217; *S. C.* 4 *Brown, Parl. Cas. by Tomlins*, 287; *Paxton v. Douglass*, 8 *Ves.* 520; *Martin v. Martin*, 1 *Ves.* 210, 212; *Perry v. Phelips*, 10 *Ves.* 34; *Clarke v. Ormond*, *Jacob, R.* 122; *Thompson v. Brown*, 4 *Johns. Ch. R.* 619.

² *Ibid.* But although courts of equity will grant an injunction in cases of this sort, they will interfere only so far as is necessary to give effect to their own decree for an administration of the assets of the deceased. But, if the executor or administrator has rendered himself personally liable to the creditor, there the injunction will not restrain the creditor from proceeding personally against him, but only against the assets. *Kent v. Pickering*, 5 *Sim.* 569; *Price v. Evans*, 4 *Sim.* 514.

³ *Cleverley v. Cleverley*, cited in 8 *Ves.* 526; *Paxton v. Douglass*, 8 *Ves.* 520.

⁴ *Thompson v. Brown*, 4 *Johns. Ch. R.* 619, 643; *Martin v. Martin*, 1 *Ves.* 211; *Ante*, § 547, and note (2), § 548; *Benson v. Le Roy*, 4 *Johns. Ch. R.* 651.

restrain the action of such officers, until a decision upon the merits of the information.^{1]}

§ 891. Courts of equity will not only grant an injunction restraining suits at law between parties upon equitable circumstances, but they will exercise the same jurisdiction to protect their own officers, who execute their processes, against any suits brought against them for acts done under or in virtue of such processes.² The ground of this assertion of jurisdiction is, that courts of equity will not suffer their processes to be examined by any other courts; and courts of law cannot know anything of their nature and effect. If they are irregularly issued or executed, it is the duty of courts of equity themselves to apply the proper remedy, and to make satisfaction.³ And for this purpose, in a proper case, it will be referred to a master, to ascertain and settle the proper compensation.⁴ Therefore, where an arrest was made by virtue of a process, which issued irregularly out of a court of equity, and an action for false imprisonment was brought against the officer who made the arrest, an injunction was issued restraining the suit.⁵ The same principle is applied to protect sequestrators in possession under a decree in a court of equity, against suits brought against them; for the court will not permit itself to be made a suitor at law; but it will examine for itself the nature of any adverse title upon application of the party.⁶ The same principle is also applied, as we have already seen, to the case of receivers.⁷ [But a court of equity will not interfere to protect a sheriff from an action by an owner of goods which have been

¹ [* *Attorney-General v. Wigan*, 5 De G. M. & G. 52; *Dawson v. Lawes*, Kay, 280.]

² *Ante*, § 833; *Parker v. Browning*, 8 Paige, R. 388; *Mackay v. Blackett*, 9 Paige, R. 437; *Albany City Bank v. Schermerhorn*, 9 Paige, R. 372; *Turner v. Turner*, 8 Eng. Law & Eq. R. 137.

³ *Eden on Injunct.* ch. 3, p. 34; 3 Wooddes. Lect. 56, p. 407; *Bailey v. Devereux*, 1 Vern. 269; *Frowd v. Lawrence*, 1 Jac. & Walk. 655; *May v. Hook*, 2 Dick. R. 619; S. C. cited 1 Jac. & Walk. 661, note; *Aston v. Heron*, 2 Mylne & Keen, 390; *Ex parte Merritt*, 5 Paige, R. 125.

⁴ *Chalie v. Pickering*, 1 Keen, R. 749; *Ex parte Merritt*, 5 Paige, R. 125.

⁵ *Bailey v. Devereux*, 1 Vern. R. 269; S. C. 1 Jac. & Walk. 640, note; *Phillips v. Worth*, 2 Russ. & Mylne, 638.

⁶ *Angel v. Smith*, 9 Ves. 338; *Ante*, § 833; *Chalie v. Pickering*, 1 Keen, R. 749.

⁷ *Ante*, § 833; *Parker v. Browning*, 8 Paige, R. 385.

wrongfully seized by such sheriff, as the property of another, on a writ issued out of chancery.^{1]}

[* § 891 *a*. So, in England, courts of equity often interpose to prevent their own officers, or persons employed under the authority of the court, from proceeding at law. Thus, commissioners for the examination of witnesses have been restrained from proceeding at law to recover their fees;² and the same principle has been applied to an auctioneer who has sold property under an order of court.^{3]}

§ 892. Injunctions to restrain suits at law are usually spoken of as common or special. The common injunction so frequently alluded to in the books of reports and practice, is the writ of injunction issued upon and for the default of the defendant, in not appearing to or answering the bill. It is also granted, where the defendant obtains an order for further time to answer, or for a commission (commonly called a *dedimus*), to take his answer.⁴ In all these cases the injunction is of course.⁵ In its terms the writ recites, that the defendant has not appeared or answered the bill, and yet is proceeding at law; and it commands the defendant to desist from all further proceedings at law, touching the matters in the bill, until he shall have fully answered the bill, cleared his contempt, and the court shall make other orders to the contrary. But the defendant is nevertheless at liberty to call for a plea, and to proceed to trial thereon, and for want of a plea to enter up judgment; but execution is thereby stayed.⁶ Such is the exigency of the writ. All other injunctions granted upon other occasions, or involving other directions, are called special injunctions.⁷

¹ *Onyon v. Washbourne*, 14 Jurist. 497. [* In a later case the refusal to interfere is put upon the ground, that the sheriff did not apply to the court for protection, at the earliest moment; and that he had notice, at the time of the seizure, that the goods were not the property of the person, against whom the process issued. *Tufton v. Harding*, 6 Jur. N. S. 116. See also *Peck v. Crane*, 24 Vt. R. 146.

² See *Blundell v. Gladstone*, 9 Sim. 455; *Ambrose v. Dunmow Union*, 8 Beav. 43.

³ *In re Weaver*, 2 M. & C. 441.]

⁴ *Eden on Injunct.* ch. 3, p. 59 to 61; *Id.* ch. 4, p. 68 to 72; *Gilb. For. Roman* ch. 11, p. 194; *James v. Downes*, 18 Ves. 523.

⁵ *Ibid.*; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 339; *Newl. Ch. Pr.* ch. 4, § 7.

⁶ *Eden on Injunct.* Append. p. 370; *Barton's Suit in Eq.* 48, note.

⁷ *Eden on Injunct.* ch. 4, p. 78; *Id.* ch. 14, p. 290; *Vipan v. Mortlock*, 2 Me-

§ 893. There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature. As, for instance, they will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition.¹ But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution.² In such cases, the injunction is merely incidental to the ordinary power of the court to impose terms upon parties, who seek its aid in furtherance of their rights. [Neither will courts of equity enjoin the United States government from prosecuting a suit at law, since the government is not liable to be sued except by its own consent given by law.³]

§ 894. In the next place, courts of equity will not relieve against a judgment at law, where the case in equity proceeds upon a defence equally available at law, but the plaintiff ought to establish some special ground for relief.⁴ The doctrine goes yet farther; and it may be asserted to be a general rule, that a defence cannot be set up, as the ground of a bill in equity for an injunction, which has been fully and fairly tried at law, although it may be the opinion of a court of equity, that the defence ought to have been sustained at law.⁵ If there are any exceptions to this

riv. R. 475; *James v. Downes*, 18 Ves. 522, 523; *Jeremy on Eq. Jurisd. B. 3*, ch. 2, § 1, p. 339; *Drummond v. Pigou*, 2 Mylne & Keen, 168; *Jeremy on Eq. Jurisd. B. 3*, ch. 2, § 1, p. 341, 342.

¹ *Eden on Injunct. ch. 2*, p. 41, 42; *Lord Montague v. Dudman*, 2 Ves. 396; 3 Wooddes. Lect. 56, p. 413; *Jeremy on Eq. Jurisd. B. 3*, ch. 2, § 1, p. 309.

² *Eden on Injunct. ch. 2*, p. 42; *Mayor of York v. Pilkington*, 2 Atk. 302; *Lord Montague v. Dudman*, 2 Ves. 396; *Attorney-General v. Cleaver*, 18 Ves. 220; *Jeremy on Eq. Jurisd. B. 3*, ch. 2, § 1, p. 308, 309; 3 Wooddes. Lect. 56, p. 413, 414.

³ *Hill v. United States*, 9 How. 386; *United States v. McLemore*, 4 How. 286.

⁴ *Harrison v. Nettleship*, 2 Mylne & Keen, 423; *Murray v. Graham*, 6 Paige, R. 622; *Lockard v. Lockard*, 16 Ala. 423; *Foster v. The State Bank*, 17 Ala. 672.

⁵ *Marine Insurance Co. v. Hodgson*, 7 Cranch, 336, 337. See *Walker v. Robins*, 14 How. U. S. R. 584; *Hendrickson v. Hinckley*, 17 How. U. S. R. 445;

rule, they must be of a very special nature.¹ But relief will be granted where the defence could not at the time, or under the circumstances, be made available at law, without any laches of the party.² Thus, for instance, if a party should recover a judgment at law for a debt, and the defendant should afterwards find a receipt under the plaintiff's own hand for the very money in question, the defendant (where there was no laches on his part) would be relieved by a perpetual injunction in equity.³ So, if a fact material to the merits should be discovered after a trial, which could not, by ordinary diligence, have been ascertained before, the like relief would be granted.⁴ [But mere ignorance of facts which would have constituted a defence at law is not sufficient to give a right to relief in equity.⁵]

§ 895. Relief will not be granted by staying proceedings at law, after a verdict, if the party applying has been guilty of laches as to the matter of defence, or might, by reasonable diligence, have procured the requisite proofs before the trial.⁶ Thus, if a defendant has omitted to file a bill for a discovery of facts, known to him,

Briesch v. McCauley, 7 Gill, 189; *Simpson v. Lord Howden*, 3 Mylne & Craig, 97, 102, 103.

¹ *Ibid.*; *Mitf. Eq. Pl. by Jeremy*, 132.

² *Farquharson v. Pitcher*, 2 Russell, R. 81; *Murray v. Graham*, 6 Paige, R. 622.

³ *Ante*, § 879; *Gainsborough v. Gifford*, 2 P. Will. 424; *Protheroe v. Forman*, 2 Swanst. 227, 232, 233; *Williams v. Lee*, 3 Atk. 224. See *Hankey v. Vernon*, 2 Cox, R. 12, 14; *Taylor v. Shepherd*, 1 Young & Coll. R. 277, 279, 280; *Hennell v. Kelland*, 1 Eq. Abridg. 377, pl. 2; *Baronne v. Brent*, 1 Vern. 176; *Smith v. Lowry*, 1 Johns. Ch. R. 320, 324; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336, 337. The cases on this subject are not perhaps quite reconcilable with each other. But I have given in the text what seems the fair result of the leading authorities. The case of the receipt stated in *Gainsborough v. Gifford*, 2 P. Will. 424, seems to have been doubted by Lord Eldon, in *Protheroe v. Forman*, 2 Swanst. R. 232, 233. But it has been recognized, either absolutely or in a qualified manner, in other cases. See *Williams v. Lee*, 3 Atk. 224; *Hennell v. Kelland*, 1 Eq. Abridg. 377, pl. 2; *Smith v. Lowry*, 1 Johns. Ch. R. 320; *Hankey v. Vernon*, 2 Cox, R. 12.

⁴ See *Sewell v. Freeston*, 1 Ch. Cas. 65; *Jarvis v. Chandler*, 1 Turn. & Russ. 319; *Iglehart v. Lee*, 4 Md. Ch. Dec. 514.

⁵ *Taliaferro v. Branch Bank*, 23 Ala. 755.

⁶ *Protheroe v. Forman*, 2 Swanst. R. 227, 232, 233; *Curtess v. Smallridge*, 1 Ch. Cas. 43; 2 Freem. R. 178; *Tovey v. Young*, Prec. in Chan. 193; *Smith v. Lowry*, 1 Johns. Ch. R. 320; *Dodge v. Strong*, 2 Johns. Ch. R. 230; *Smith v. Walker*, 8 S. & M. 131; *Trevor v. McKay*, 15 Geo. 550; *Sample v. Barnes*, 14 How. 70; *Powell v. Stewart*, 17 Ala. 719.

and material to his defence, and has suffered the case to go to trial without adequate proof of such facts, he cannot afterwards claim an injunction, or a new trial from a court of equity; for it was his own folly not to have prepared himself with such proof, or to have filed a bill for a discovery, and to have procured a stay of the trial until the discovery.¹ So, if the facts on which the bill is founded, although discovered since the trial, might have been established at the trial, upon the cross-examination of a witness, and the party was put upon the inquiry, relief will be refused.² So, where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the rules of the proper court of law,³ courts of equity will not entertain a bill for an injunction upon an alleged ground, that the original demand was unconscientious or the subject-matter of an account, provided it was competent for the party to have laid those grounds before the jury on the trial, or before the court of law, upon the motion of a new trial.⁴

§ 895 a. Indeed, this doctrine is not limited to mere cases decided in the courts of common law; but it is applicable to all cases where the matter of the controversy has been already decided on by another court of competent jurisdiction, even though it be a foreign court or where it might have been made available in that court, as a matter of claim or defence, in a suit pending in such court. For it has been truly said, not to be the practice of

¹ *Sewell v. Freeston*, 1 Ch. Cas. 65; *Mitf. Eq. Pl. by Jeremy*, 132; *Protheroe v. Forman*, 2 Swanst. 227, 232, 233, and note (b). See, also, *Hankey v. Vernon*, 2 Cox, R. 12; *Williams v. Lee*, 3 Atk. 224; *Baronne v. Brent*, 1 Vern. 176; *Richards v. Symmes*, 2 Atk. R. 319; *Taylor v. Sheppard*, 1 Younge & Coll. 271, 280; *Whitmore v. Thornton*, 3 Price, 231; *Field v. Beaumont*, 1 Swanst. R. 209; *Smith v. Lowry*, 1 Johns. Ch. R. 320; *Barker v. Elkins*, 1 Johns. Ch. R. 465; *McVickar v. Wolcott*, 4 Johns. R. 510; *Lansing v. Eddy*, 1 Johns. Ch. R. 49, 51; *Le Guen v. Gouverneur*, 1 Johns. Cas 436.

² *Taylor v. Shepherd*, 1 Younge & Coll. 271, 280.

³ [It seems, if he has had no opportunity to move for a new trial in the court where the verdict was rendered, equity will grant a new trial. *Knifong v. Hendricks*, 2 Gratt. 212.]

⁴ *Bateman v. Willoe*, 1 Sch. & Lefr. 201; *Lansing v. Eddy*, 1 Johns. Ch. R. 49; *Smith v. Lowry*, 1 Johns. Ch. R. 320; *Barker v. Elkins*, 1 Johns. Ch. R. 465; *Simpson v. Hart*, 1 Johns. Ch. R. 97, 98; *Dodge v. Strong*, 2 Johns. Ch. R. 228; *Duncan v. Lyon*, 3 Johns. Ch. R. 351; *Burton v. Wiley*, 26 Verm. 430; *Falls v. Robinson*, 5 Maryland, 365; *Foster v. Wood*, 6 Johns. Ch. R. 90; *Norton v. Woods*, 5 Paige, R. 249.

courts of equity to assume jurisdiction in favor of parties, who, having had an opportunity of asserting their title in another court, where the matter has been properly the subject of adjudication, have either missed that opportunity, or have not thought proper to bring their title forward.¹

§ 896. The general reasoning upon which this doctrine is maintained, is the common maxim, that courts of equity, like courts of law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress multiplicity of suits. Lord Redesdale has stated it with great clearness and force. "It is not sufficient (said he) to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because, if a matter has been already investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. Rules are established, some by the legislature, some by the courts themselves, for the purpose of putting an end to litigation. And it is more important that an end should be put to litigation than that justice should be done in every case. The truth is, that, owing to the inattention of parties, and several other causes, exact justice can very seldom be done."² "The inattention of parties, in a court of law, can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law; and, therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law. So, where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter

¹ *Marquis of Breadalbane v. Marquis of Chandos*, 2 Mylne & Craig, 721, 732, 733; *Norton v. Woods*, 5 Paige, R. 249. A foreign judgment is now generally held to be as conclusive as a domestic judgment, when it has been rendered upon the merits. But still, it may be affected by fraud, and if it is sought to be made available here, an injunction will lie to it in the same way as it will lie to any other security, or any judgment here. *Bowles v. Orr*, 1 Younge & Coll. 464, 473.

² *Bateman v. Willoe*, 1 Sch. & Lefr. 204; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336, 337. See, also, *Barker v. Elkins*, 1 Johns. Ch. R. 465.

which has been already discussed in a court of law, a matter capable of being discussed there, and over which a court of law had full jurisdiction.”¹ “A bill for a new trial is watched by equity with extreme jealousy. It must see, that injustice has been done not merely through the inattention of the parties, but some such reasons as those I have mentioned must exist.”²

§ 897. In the next place, courts of equity will not relieve a party by an injunction to a judgment, or other proceedings at law, against a mistake in pleading, [or a failure from accident to file a set-off to the plaintiff’s claim, which may be enforced in law,³] or in the conduct of the cause;⁴ or, when he has failed in obtaining fresh evidence; or, merely to let in new corroborative evidence;⁵ or, because a question of law has been erroneously decided by the court of law.⁶

§ 898. Courts of equity will not grant an injunction to stay proceedings at law, merely on account of any defect of jurisdiction of the court where such proceedings are pending.⁷ It has been said that, although courts of equity do not profess to proceed upon the ground of any such defect of jurisdiction, yet, that it is remarkable that one of the most ordinary instances of this species of interposition by the equity courts in England seems exclusively founded upon it, namely, where a suit is instituted in the Spiritual Court for tithes, and a *modus* is set up as a defence.⁸ Perhaps this criticism is a little too refined. The spiritual courts have a general jurisdiction in matters of tithes; and, if the defendant should plead a *modus* in a suit there for tithes, and the *modus* should be admitted, the spiritual courts are not ousted of their jurisdiction. But if the *modus* should be denied, then the spirit-

¹ *Bateman v. Willoe*, 1 Sch. & Lefr. 205, 206.

² *Ibid.* p. 206.

³ *Hudson v. Kline*, 9 Gratt. 379.

⁴ See *George v. Strange*, 10 Gratt. 499; *Jamison v. May*, 8 English, 600; *State Bank v. Stanton*, 2 Gilm. 352.

⁵ *Eden on Injunct.* ch. 3, p. 10, 11; *Stephenson v. Wilson*, 2 Vern. 325; *Blackhall v. Combs*, 2 P. Will. 70; *Holworthy v. Mortlock*, 1 Cox, R. 141; *Kemp v. Mackrell*, 2 Ves. 579; *Stevens v. Praed*, 2 Ves. Jr. 519; *Ware v. Horwood*, 14 Ves. 31; *Lansing v. Eddy*, 1 Johns. Ch. R. 49; *Hankey v. Vernon*, 2 Cox, R. 12.

⁶ *Mar. Ins. Co. v. Hodgson*, 7 Cranch, 336, 337; *Simpson v. Hart*, 1 Johns. Ch. R. 95 to 99; *Hunt v. Coachman*, 6 Rich. Eq. R. 286.

⁷ [As where no process had been legally served on the defendant. *Secor v. Woodward*, 8 Ala. 500, 767; *Walker v. Robbins*, 14 How. 584.]

⁸ *Eden on Injunct.* ch. 7, p. 137.

ual courts cannot proceed, *propter triationis defectum*, and a prohibition lies. The jurisdiction then attaches in equity in such cases, not upon the ground of a want of original jurisdiction of the spiritual courts over the suit, but upon the ground of the remedy there, under such circumstances, not being adequate and complete; and the injunction follows as a natural result of the necessity of exercising an exclusive jurisdiction.¹ Lord Hardwicke, in a case of this sort, said: "Injunctions in this court are granted upon a suggestion of something which affects the rights or convenience of the party in the proceedings in the other court, or where there is a concurrent jurisdiction."² The same remarks apply to the exercise of exclusive jurisdiction by courts of equity in cases of legacies, where an injunction is issued against proceedings in the spiritual courts.³

§ 899. It has sometimes been made a question whether courts of equity have authority to stay proceedings in the courts of foreign countries. Nothing can be clearer than the proposition that the courts of one country cannot exercise any control or superintending authority over those of another country. The independence, equality, and sovereignty of every country would repudiate any such interference, as inconsistent with its own supremacy within its own territorial domains. But although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country, are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit. In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities; and enforce obedience to their decrees by process *in personam*.⁴ Hence,

¹ See *Rotheram v. Fanshaw*, 3 Atk. 627, 629, 630; *Ante*, § 519, 520.

² *Ibid*.

³ *Ibid*.; *Ante*, § 595 to 602.

⁴ *Eden on Injunct.* ch. 7, p. 141, 142; *Ante*, § 743, 744; *Com. Dig.* ch. 3, X.; 4 W. 27; *Lord Cranstown v. Johnsten*, 3 Ves. Jr. 170, 182; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Harrison v. Gurney*, 2 Jac. & Walk. 562; *Mead v. Merritt*, 2

it is the known habit of courts of equity to relieve in cases of contracts and other matters, respecting lands situated in foreign countries.¹

Paige, R. 404; *Mitchell v. Bunch*, 2 Paige, R. 606; *Portarlington v. Soulby*, 3 M. & Keen, 104; *Bowles v. Orr*, 1 Younge & Coll. R. 464. In *Portarlington v. Soulby*, the Lord Chancellor said: "Soon after the Restoration, and when this, like every other branch of the court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of *Love v. Baker*, 2 Freem. 125; 1 Ch. Cas. 67. In *Love v. Baker* it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction there, and the court allowed the *subpœna* to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain these proceedings at Leghorn, after advising with the other judges. But the report adds: '*Sed quære*, for all the bar was of another opinion'; and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affects to bind, our orders being only pointed at the parties, to restrain them from proceeding. Accordingly, this case of *Love v. Baker* has not been recognized or followed in later times. Two instances are mentioned, in Mr. Hargrave's collection, of the jurisdiction being recognized; and in the case of *Warnton v. May*, 5 Ves. 71; see, also, *Kennedy v. Earl of Cassillis*, 2 Swanst. 313; *Bushby v. Munday*, 5 Madd. R. 297; *Harrison v. Gurney*, 2 J. & W. 563; *Beauchamp v. Marquis of Huntley*, Jac. 546, which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment, or carrying on any action in what is called 'the Court of Great Session in Scotland,' meaning, of course, the Court of Session. I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of *Campbell v. Houlditch*, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Session in Scot-

¹ *Ibid.*; *Ante*, § 743, 744; *Archer v. Preston*, 1 Eq. Abridg. 133; *Earl of Arglasse v. Muschamp*, 1 Vern. 75; S. C. 2 Ch. Rep. 266; *Earl of Kildare v. Eustace*, 1 Vern. 419; S. C. 2 Ch. Cas. 188; 1 Eq. Abridg. 133; *Toller v. Carteret*, 2 Vern. 494; S. C. 1 Eq. Abridg. 134, pl. 5; *Foster v. Vassall*, 3 Atk. 589; *Penn v. Lord Baltimore*, 1 Ves. 444; *Cranstown v. Johnston*, 3 Ves. 170; *White v. Hall*, 12 Ves. 321; *Portarlington v. Soulby*, 3 Mylne & Keen, 104; *Wharton v. May*, 5 Ves. 71; *Massie v. Watts*, 6 Cranch, 158, 160; *Briggs v. French*, 1 Sumner, R. 504; *Ante*, § 743, 744.

§ 900. Notwithstanding the clearness of the general principle, the jurisdiction to stay proceedings in suits in foreign countries, by injunction *in personam* upon parties resident within the realm, was greatly doubted in the time of Lord Clarendon; and his lordship, after taking the opinion of the judges, decided against the jurisdiction. His decision, however, was not satisfactory to the bar;¹ and the doctrine has, in modern times, been completely established the other way. It is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may re-

land. From the note, which his lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority. In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party, on whom this order is made, being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel-interests, or to convey real property locally situate abroad; if, for instance, as in *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, it can decree the performance of an agreement touching the boundary of a province in North America; or, as in the case of *Tellor v. Carteret*, 2 Vern. 449, can foreclose a mortgage in the Isle of Sark, one of the channel islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance or other act, *in pais*, or the instituting or prosecution of an action in a foreign court. It is upon these grounds, I must add, and these precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in the year 1682, in *Arglasse v. Muschamp*, 1 Vern. 75, and again by Lord Macclesfield, in the year 1724, in *Fryer v. Bernard*, 2 P. Will. 261, of granting a sequestration against the estates of a defendant situated in Ireland. The reasons given by that great judge in the latter case plainly show that he went upon a ground which would now be untenable, viz. what he terms the superintendent power of the courts in this country over those in Ireland. And, indeed, he supports his order by expressly referring to the right, then claimed by the King's Bench in England, to reverse the judgments of the King's Bench in Ireland. This pretension, however, has long ago been abandoned, and has, indeed, been discontinued by parliamentary interposition; and the power of enforcing in Ireland judgments pronounced here, and *vice versâ*, is at the present time the subject of legislative consideration." *Ante*, § 743, 744.

¹ *Love v. Baker*, 1 Ch. Cas. 67; S. C. 2 Freem. R. 125; *Portarlington v. Soulby*, 3 Mylne & Keen, 104, 107, and the comments of the Lord Chancellor, cited *ante*, § 899, note; *Bunbury v. Bunbury*, 2 Eq. Jurist (English), for 1839, p. 104, 111.

quire; and with that view to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country.¹ There is one exception to this doctrine which has been long recognized in America; and that is, that the State courts cannot enjoin proceedings in the courts of the United States;² nor the latter in the former courts.³ This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.⁴ But the like doctrine has been recently applied by the State courts to suits and judgments in other American State courts, where the latter are competent to administer the proper relief.⁵

§ 901. This process is very beneficially applied to suppress vexatious litigation, in a manner analogous to bills of peace.⁶ Courts of equity will enjoin all vexatious litigation.⁷ Thus, for instance,

¹ *Bushby v. Munday*, 5 Madd. R. 307, 308; *Cruikshanks v. Robarts*, 6 Madd. R. 104; *Eden on Injunct.* ch. 7, p. 141, 142; *Great Falls Co. v. Worster*, 3 Foster, 462; *The Carron Iron Co. v. Maclaren*, 35 Eng. Law & Eq. R. 37. See, however, *Jones v. Geddes*, 1 Phillips, Ch. R. 725; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Ante*, § 743, 744.

² See *English v. Miller*, 2 Rich. Eq. R. 320.

³ But see *Craft v. Lathrop*, 2 Wallace, Jr. 103.

⁴ *Diggs v. Wolcott*, 4 Cranch, 179; *McKim v. Voorhies*, 7 Cranch, R. 279. See also *Cruikshanks v. Robarts*, 6 Madd. R. 104. In *Mead v. Merritt* (2 Paige, R. 404, 405), Mr. Chancellor Walworth, after admitting the general principles, said that it had frequently been decided in that court (the Court of Chancery of New York), that it would not sustain an injunction bill to restrain a suit or proceeding previously commenced in a sister-state, or in any of the federal courts. That not only comity, but public policy, forbade the exercise of such a power. In *Mitchell v. Bunch* (2 Paige, 606), the same court not only asserted jurisdiction to decree the application of real property, situate out of the jurisdiction of the court, but to compel the defendant, either to bring the property in dispute within the jurisdiction of the court, or to execute a conveyance or transfer thereof, so as to vest the legal title, as well as the possession, according to the *lex rei sitæ*. *Ante*, § 743, 744.

⁵ *Mead v. Merritt*, 2 Paige, R. 402; *Bicknell v. Field*, 8 Paige, R. 440, 444; *Grant v. Quick*, 5 Sandf. 612.

⁶ The prevention of multiplicity of suits is a distinct ground, upon which courts of equity maintain jurisdiction in a variety of cases. Hence it is that where a court of equity has acquired a jurisdiction for a discovery, it will, in many cases, proceed to make a final decree upon the merits, in order to prevent multiplicity of suits. *Ante*, § 64, 546.

⁷ *Ante*, § 852 to 860; *Eldridge v. Hill*, 2 Johns. Ch. R. 282; *Cooper*, Eq. Pl. 153, 154.

where a party is guilty of continual and repeated breaches of his covenants; although it may be said that such breaches may be recompensed by repeated actions of covenant: yet a court of equity will interpose, and enjoin the party from further violations of such covenants. For, it has been well remarked, that the power has, in many instances, been recognized at law, as resting on the very circumstance, that, without such interposition, the party can do nothing but repeatedly resort to law; and when suits have proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a court of equity attaches.¹

[* § 901 *a*. Where land depending upon the same title had been laid out into town lots, or otherwise divided among many occupants, who are threatened with numerous suits, a bill in equity was held to lie in the Circuit Court of the United States, to quiet the title, although the complainants have a legal title, and consequently an adequate remedy in a court of law, in each particular case.²]

§ 902. Upon the same ground, courts of equity have interposed, by way of injunction, to prevent a party, who has been discharged from a contract by the sentence of a foreign court, from being again sued on the same contract in the courts of law of another state. Such a sentence, if obtained upon the merits, is, or certainly ought to be, conclusive between the parties; and as such, there would seem to be a complete defence at law against such a new suit by the plea of *res judicata*. But courts of equity have deemed it right, nevertheless, to sustain the jurisdiction; because the nature and effect of a foreign judgment may not be without hazard and embarrassment in a suit at law; and there is great difference between domestic and foreign judgments in their forms, as well as in their effects, as records.³

§ 903. With a view to the same beneficial purpose, and to suppress undue and mischievous litigation, courts of equity will, in like manner, prevent a party from setting up an unconscientious defence at law, or from interposing impediments to the just rights of the other party.⁴ In such cases, courts of equity act by in-

¹ *Waters v. Taylor*, 2 V. & Beam. 302. See, also, *Trustees of Huntingdon v. Nicoll*, 3 Johns. R. 566; *Ware v. Horwood*, 14 Ves. 33.

² [* *Crews v. Burcham*, 1 Black, 352.]

³ *Burrows v. Jennino*, Sel. Cas. Ch. 69; S. C. 2 Strange, 733; *Moseley*, R. 1; *Ante*, § 889.

⁴ *Eden on Injunct.* ch. 16, p. 349, 350. See *Martin v. Nicholls*, 3 Sim. R. 458; *Bowles v. Orr*, 1 Younge & Coll. 464.

junction, and by that process prohibit the party from asserting such an unconscientious defence, or from setting up such an impediment to the obstruction of justice. In cases of this sort, they act, as ancillary to the administration of justice in other courts. Thus, for instance, if an ejectment is brought to try a right to land in a court of common law, a court of equity will, under proper circumstances, restrain the party in possession from setting up any title, which may prevent the fair trial of the right; as, for example, a term of years or other outstanding interest in a trustee, or lessee, or mortgagee. But this will not be done in every case; for as the court proceeds upon the principle, that the party in possession ought not in conscience to use an accidental advantage, to protect his possession against a real right in his adversary, if there is any counter-equity in the circumstances of the case, which meets the reasoning upon this principle, the court will not interfere. Thus, it will not interfere against the possessor, who is a *bonâ fide* purchaser for a valuable consideration, without notice of the adverse claim at the time of his purchase.¹

§ 904. Cases often arise, in which a party may be entitled to proceed in a suit at law for damages, when a complete equitable defence exists,² which is yet incapable of being asserted at law. In such cases the suit at law is treated as vexatious, and will be stayed by an injunction. Thus, for instance, if a decree has been made against a vendor for the specific performance of a contract for the sale of land, notwithstanding the vendee has not strictly complied with the terms of the contract, and subsequently a suit is brought by the vendor against the vendee for the breach of the contract; a court of equity will restrain the suit as being unjustifiable and vexatious.³ So (as has been already stated), if a creditor should give time to his debtor, and should thereby release the surety in equity, and he should afterwards proceed at law against the surety, the suit would be stopped by injunction upon a similar ground.⁴ Indeed, there can scarcely be found an end to the enumeration of cases, in which vexatious suits of this sort have been

¹ Mitford, Eq. Pl. by Jeremy, 134, 135; Eden on Injunct. ch. 16, p. 349, 350; Bond v. Hopkins, 1 Sch. & Lefr. 429; Cooper, Eq. Pl. 143; Baker v. Mellish, 10 Ves. 549.

² See McClellan v. Kinnaird, 6 Gratt. 352.

³ Reynolds v. Nelson, 6 Madd. R. 290.

⁴ Bank of Ireland v. Beresford, 6 Dow, R. 233; *Ante*, § 324, 325, 326; Bowmaker v. Moore, 3 Price, R. 219. See Clarke v. Henty, 3 Younge & Coll. 187.

suppressed by injunctions, when there was no redress at law, and yet when, upon the principles of justice, the party was entitled to complete protection against such litigation.

§ 905. We shall now consider injunctions, to restrain the alienation of property in the largest sense of the words. The propriety of this sort of relief will at once be seen, by considering a very few cases, in which it is indispensable to secure the enjoyment of a specific property; or to preserve the title to such property; or to prevent frauds or gross and irremediable injustice in respect to such property.

§ 906. We have spoken of courts of equity decreeing the specific delivery of deeds and other instruments,¹ and of chattels.² This remedial justice is administered by means of the process of injunction. In regard to negotiable securities, as by their being transferred to a *bonâ fide* holder without notice, the latter may be entitled to recover upon them, notwithstanding any fraud in their original concoction, or the loss of them by the real owner; it is often indispensable to the security of the party, against whose rights they may be thus made available, to obtain an injunction prohibiting any such transfer.³

§ 907. The same principle is applied to restrain the transfer of stocks. Thus, for instance, where there is a controversy respecting the title to stock under different wills, an injunction will be granted to restrain any transfer *pendente lite*.⁴ So, an injunction will be granted where the title to stock is controverted between principal and agent;⁵ or where a trustee or agent attempts to transfer it for his own benefit, and to the injury of the party beneficially entitled to it.⁶ [* So an injunction will be granted to re-

¹ *Ante*, § 703, 704, 705.

² *Ante*, § 709; *Fells v. Read*, 3 Ves. Jr. 70; *Nutbrown v. Thornton*, 10 Ves. 160, 163; *Osborn v. Bank of the United States*, 9 Wheaton, R. 845; *Eden on Injunct.* ch. 14, p. 313.

³ *Ante*, § 703; 1 Madd. Ch. Pr. 127; 1 Fonbl. Eq. B. 1, ch. 1, § 8, note (y); *Smith v. Haytwell*, Amb. R. 66; *Lloyd v. Gurdon*, 2 Swanst. R. 180; *King v. Hamlet*, 4 Sim. R. 223; *Patrick v. Harrison*, 3 Bro. Ch. R. 476; *Eden on Injunct.* ch. 14, p. 292; *Osborn v. Bank of U. States*, 9 Wheaton, R. 845; *Hood v. Aston*, 1 Russell, R. 412. See *Hodgson v. Murray*, 2 Simons, R. 515.

⁴ *King v. King*, 6 Ves. 172.

⁵ *Chedworth v. Edwards*, 8 Ves. 46. But see 1 Madd. Ch. Pr. 128, note (e); *Osborn v. Bank of U. States*, 9 Wheaton, R. 845.

⁶ *Osborn v. Bank of U. States*, 9 Wheaton, R. 844, 845; *Stead v. Clay*, 1 Sim. R. 294; *Rogers v. Rogers*, 1 Anst. 174.

strain a party from suing at law upon the debentures for interest, or dividends, declared upon the shares of a joint stock company, where the shares held by the defendant were fraudulently issued, in the first instance, but *bonâ fide* purchased in the market, in the due course of business.¹] So, also, to restrain the payment of money, where it is injurious to the party to whom it belongs; or where it is in violation of the trust, to which it should be devoted.² So, too, to restrain the transfer of diamonds or other valuables, where the rightful owner may be in danger of losing them.³

§ 908. In like manner, an injunction will be granted to restrain a party from making vexatious alienations of real property, *pendente lite*.⁴ So, also, to restrain a vendor from conveying the legal title to real estate pending a suit for the specific performance of a contract for the sale of that estate.⁵ For, in every such case, the plaintiff may be put to the expense of making the vendor a party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by such new outstanding title under the transfer.⁶ Although the maxim is, *pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void at all times, and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it; but with regard to them, the title is to be taken as if it had never existed. Otherwise, suits would be indeterminable, if one party, pending the suit, could, by conveying to others, create a necessity for introducing new parties.⁷

¹ [* *Athenæum Life Ass. Co. v. Pooley*, 3 De G. & J. 294.]

² See *Reeve v. Parkins*, 2 Jac. & Walk. 390; *Whittingham v. Burgoyne*, 3 Anst. 900; *Green v. Lowes*, 3 Bro. Ch. R. 217.

³ *Ximènes v. Franco*, 1 Dick. 149; *Tonnins v. Prout*, 1 Dick. 387; *Eden on Injunct.* ch. 14, p. 313.

⁴ *Daly v. Kelly*, 4 Dow, R. 440; *Ante*, § 406; *Post*, § 953.

⁵ *Echcliff v. Baldwin*, 16 Ves. 267; *Daly v. Kelly*, 4 Dow, R. 435; *Mitf. Eq. Pl.* by *Jeremy*, 46, 135, 136, 137.

⁶ *Ibid.* See *Mitf. Eq. Pl.* by *Jeremy*, 135; *Story on Eq. Pl.* § 156, 351.

⁷ *Ante*, § 405, 406; *Metcalfe v. Pulvertoft*, 2 Ves. & B. 205; *Bishop of Winchester v. Paine*, 11 Ves. 197; *Gaskeld v. Durdin*, 2 Ball & B. 169; *Bishop of Winchester v. Beavor*, 3 Ves. 314; *Moore v. Macnamara*, 2 Ball & B. 186. In some of the authorities, the doctrine seems to be countenanced that a purchaser, *pendente lite*, should be made a party. (See *Echcliff v. Baldwin*, 16 Ves. 267; *Daly v.*

§ 909. In the next place, let us proceed to the consideration of injunctions in cases of waste.¹ The state of the common law with regard to waste was very learnedly expounded by Lord Chief Justice Eyre, in a celebrated case;² and it can be best stated in his own words. "At common law" (said he) "the proceeding in waste was by writ of prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered. But, if that was not obeyed, and an *alias* and *pluries* produced no effect, then came the original writ of attachment out of chancery, returnable in a court of common law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment, which was and is the foundation of all proceedings in prohibition, and of many other proceedings in this court at this day, &c. That writ being returnable in a court of common law, and most usually in the Court of Common Pleas, on the defendant appearing, the plaintiff counted against him; he pleaded; the question was tried; and, if the defendant was found guilty, the plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said (and truly so, I think, so far as can be collected from the text-writers) that, at the common law, this proceeding lay only against tenant in dower, tenant by the courtesy, and guardian in chivalry. It was extended, by different statutes, (stat. of Marlbridge, ch. 24; stat. of Gloucester, ch. 5,) to farmers, tenants for life, and tenants for years, and, I believe, to guardians in socage.³ That which these statutes gave by way Kelly, 4 Dow, R. 535.) But the true doctrine seems to be that asserted in the text. If, however, the purchaser, *pendente lite*, be a purchaser of the legal estate, and not of a mere equitable estate, it may, after the determination of the pending suit, be necessary, in order to compel a surrender of his title, or to declare it void, to institute a new suit against him. Bishop of Winchester v. Paine, 11 Ves. 197; Murray v. Ballou, 1 Johns. Ch. R. 576 to 581; Murray v. Lylburn, 2 Johns. Ch. R. 444, 445; Metcalfe v. Pulvertoft, 2 Ves. & B. 204, 205; Eades v. Harris, 1 Younge & Coll. New R. 281; Story on Eq. Plead. § 156, 351.

¹ See Com. Dig. *Chancery*, D. 11, 4 X.

² Jefferson v. Bishop of Durham, 1 Bos. & Pull. 120.

³ Mr. Reeves (Hist. of the Law, Vol. 1, p. 186, Vol. 2, p. 73, 74, 148, note) seems to suppose that these statutes were but an affirmance of the common law. In this opinion he is opposed by Lord Coke and other great authorities; and Mr. Eden (on Injunct. ch. 8, p. 145, note) very properly considers the weight of authority decidedly against Mr. Reeves.

of remedy was not so properly the introduction of a new law as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act which introduced anything substantially new was that (stat. of Gloucester, ch. 13) which gave a writ of waste or estrepement, pending the suit. It follows, of course, that this was a judicial writ, and was to issue out of the courts of common law. But, except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text-writers, that any prohibition could issue from those courts. By the statute of Westminster 2d, the writ of prohibition is taken away, and the writ of summons is substituted in its place; and, although it is said by Lord Coke, when treating of prohibition at the common law, that it 'may be used at this day,' those words, if true at all, can only apply to that very ineffectual writ, directed to the sheriff, empowering him to take the *posse comitatus*, to prevent the commission of waste intended to be done. The writ, directed to the party, was certainly taken away by the statute. At least, as far as my researches go, no such writ has issued, even from chancery, in the common cases of waste by tenants in dower, tenants by the courtesy, and guardians in chivalry, tenants for life, &c., &c., since it was taken away by the statute of Westminster 2d. Thus the common-law remedy stood, with the alteration above mentioned, and with the judicial writ of estrepement, introduced *pendente lite*."¹

¹ Ibid. p. 121, 122. Mr. Justice Blackstone has given a very full view of the action of waste at the common law, and as awarded by statute. He says: "A writ of waste is also an action, partly founded upon the common law, and partly upon the statute of Gloucester (6 Edw. I. ch. 5), and may be brought by him who hath the immediate estate of inheritance in reversion, or remainder, against the tenant for life, tenant in dower, tenant by the courtesy, or tenant for years. This action is also maintainable in pursuance of the statute (13 Edw. I. c. 22) of Westminster 2d, by one tenant in common of the inheritance against another who makes waste in the estate holden in common. The equity of which statute extends to joint tenants, but not to coparceners; because, by the old law, coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste. But tenants in common and joint tenants could not; and, therefore, the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any further waste (2 Inst. 403, 404). But these tenants in common and joint tenants are not liable to the penalties of the statute of Gloucester, which extends only to such as have life-estates, and do waste to the prejudice of the inheritance. The

§ 910. To this luminous exposition of the state of the common law, it may be added, that there was, by the common law, another remedy of a preventive nature in the writ of estrepement. This lay after a judgment obtained in a real action, before possession was delivered by the sheriff, to prevent the tenant from committing waste in the lands recovered.¹ And the statute of Gloucester, which gave the writ of estrepement *pendente lite*, also directed (ch. 5) that the tenant should forfeit the place wasted, and also treble damages.²

§ 911. The remedy by writ of estrepement was applicable only to cases of real actions; and, when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply, courts of equity, acting upon the principle of preserving the property, *pendente lite*, supplied the defect, and interposed by way of injunction.³

§ 912. But courts of equity have, by no means, limited themselves to an interference in cases of this sort. They have, indeed,

waste, however, must be something considerable; for, if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste. *Nam de minimis non curat lex.*" See 3 Black. Comm. 227, 228; Finch. L. 29.

¹ Eden on Injunct. ch. 9, p. 159; Com. Dig. *Waste*, A. B.; Fitz. Nat. Brev. 60; Cooper, Eq. Pl. 147, 148; 3 Black. Comm. 225 to 227. Mr. Justice Blackstone, in his Commentaries (3 Black. Comm. 225, 226), has given a much fuller account of the writ of estrepement than that given in the text. It is too long for insertion in this place; but the following extract corroborates the statement in the text. "Estrepement is an old French word, signifying the same as waste or extirpation; and the writ of *estrepement* lay at the common law *after* judgment obtained in any action real (2 Inst. 328), and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But, as in some cases, the demandant may be justly apprehensive that the tenant may make waste, or *estrepement*, pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester (6 Edw. I. ch. 13), gave another writ of *estrepement*, *pendente placito*, commanding the sheriff firmly to inhibit the tenant, '*Ne faciat vastum vel estrepamentum pendente placito dicto indiscusso.*' (Regist. 77.) And by virtue of either of these writs, the sheriff may resist them that do, or offer to do waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them; or, if necessity require, he may take the *posse comitatus* to his assistance. So odious, in the sight of the law, is waste and destruction." (2 Inst. 399.)

² Com. Dig. *Waste*, C. 1; Id. Chancery, D. 11; 2 Inst. 299; 3 Black. Com. 227 to 299.

³ Mitf. Eq. Pl. by Jeremy, 136; *Pultney v. Shelton*, 5 Ves. 261, note; Cooper, Eq. Pl. 146, 147; 3 Black. Comm. 227.

often interfered in restraining waste by persons having limited interests in property, on the mere ground of the common-law rights of the parties, and the difficulty of obtaining the immediate preservation of the property from destruction or irreparable injury, by the process of the common law. But they have also extended this salutary relief to cases where the remedies provided in the courts of common law cannot be made to apply; and, where the titles of the parties are purely of an equitable nature;¹ and, where the waste is, what is commonly, although with no great propriety of language, called equitable waste;² meaning acts which are deemed waste only in courts of equity; and where no waste has been actually committed, but is only meditated or feared to be done, by a bill *quia timet*.³

§ 913. In order to show the beneficial nature of the remedial interference of courts of equity in cases of waste, it may not be without use to suggest a few cases where it is indispensable for the purposes of justice, and there is either no remedy at all at law, or none which is adequate. In the first place, there are many cases where a person is punishable at law for committing waste, and yet a court of equity will enjoin him. As, where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained, by injunction, from committing waste;⁴ although, if he did commit waste, no action of waste would lie against him by the remainder-man for life, for he has not the inheritance, or by the remainder-man in fee, by reason of the interposed remainder for life.⁵ So, a ground landlord may have an injunction to stay waste against an under-lessee.⁶ So, an

¹ Mitf. Eq. Pl. by Jeremy, 114, 115, and cases cited in note (u); 3 Wooddes. Lect. 56, p. 399 to 406; 1 Madd. Ch. Pr. 114 to 121; Jeremy, Eq. Jurisp. B. 3, ch. 2, § 1, 327 to 344.

² Marquis of Downshire v. Lady Sandys, 6 Ves. 109, 140, 115; Chamberlain v. Dummer, 1 Bro. Ch. R. 166; Post, § 915.

³ Ante, § 825 to 846.

⁴ [But equity will not interfere to make a tenant for life liable for *permissive* waste; for such a tenant is not bound to repair. Powys v. Blagrove, 27 Eng. Law & Eq. R. 568.]

⁵ Com. Dig. Waste, C. 3; Abraham v. Bubb, 2 Freem. Ch. R. 53; Garth v. Cotton, 1 Dick. 183, 205, 208; S. C. 1 Ves. 555; Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, 3 Atk. 210; Eden on Injunct. ch. 9, p. 162, 163; Davis v. Leo, 6 Ves. 787.

⁶ Farrant v. Lovel, 3 Atk. 723; S. C. Ambler, R. 105; 3 Wooddes. Lect. 56, p. 400, 404.

injunction may be obtained against a tenant from year to year, after a notice to quit, to restrain him from removing the crops, manure, &c., according to the usual course of husbandry.¹ So, it may be obtained against a lessee, to prevent him from making material alterations in a dwelling-house; as, by changing it into a shop or warehouse.²

§ 914. In the next place, courts of equity will grant an injunction in cases where the aggrieved party has equitable rights only; and, indeed, it has been said, that these courts will grant it more strongly where there is a trust estate.³ Thus, for instance, in cases of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted, although there is no remedy at law.⁴ So, where there is a contingent estate, or an executory devise over, dependent upon a legal estate, courts of equity will not permit waste to be done to the injury of such estate; more especially not, if it is an executory devise of a trust-estate.⁵

§ 915. In the next place in regard to equitable waste, which may be defined to be such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed, from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. As if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient, (but not otherwise,) a court of equity will restrain the mortgagor by injunction.⁶ So, if there be a tenant for life without impeachment for waste, and he should pull down houses, or do other waste wantonly and maliciously, a court of equity would restrain him; for, it is said, a court of equity ought to moderate the exercise of

¹ *Onslow v. —*, 16 Ves. 173; *Pratt v. Brett*, 2 Madd. R. 62.

² *Douglass v. Wiggins*, 1 Johns. Ch. R. 435.

³ *Robinson v. Litton*, 3 Atk. 200; *Garth v. Cotton*, 1 Dick. 183; S. C. 1 Ves. 555; *Stansfield v. Habbergham*, 10 Ves. 277, 278.

⁴ *Ibid.*; *Farrant v. Lovell*, 3 Atk. 723; *Phoenix v. Clark*, 2 Halst. Ch. R. 447; *Eden on Injunct.* ch. 9, p. 165, 166; 3 Wooddes. Lect. 56, p. 405; *Brady v. Waldron*, 2 Johns. Ch. R. 148; *Humphreys v. Harrison*, 1 Jac. & Walk. 581; *Ante*, § 710 a.

⁵ *Stansfield v. Habbergham*, 10 Ves. 278; *Eden on Injunct.* ch. 9, p. 170, 171; 3 Wooddes. Lect. 56, p. 399, 400; *Jeremy, Eq. Jurisd.* B. 3, ch. 2, § 1, p. 339.

⁶ *King v. Smith*, 2 Hare, R. 239.

such a power, and *pro bono publico*, restrain extravagant humorous waste.¹ Upon this ground, tenants for life without impeachment for waste, [and their assignees,²] and tenants in tail, after possibility of issue extinct, have been restrained, not only from acts of waste to the destruction of the estate, but also from cutting down trees planted for the ornament or shelter of the premises.³ [So, a tenant for life, without impeachment of waste, has been restrained from cutting timber where certain trustees had powers inconsistent with his right, and to which it was expressly made subject.⁴] In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.

§ 916. Upon similar grounds, although courts of equity will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint tenants, because they have a right to enjoy the estate as they please; yet they will interfere in special cases; as, where the party committing the waste is insolvent; or, where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoyment of the estate.⁵

§ 917. From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is so unquestionable, that there is no wonder that the resort to the courts of law

¹ *Abraham v. Bubb*, 2 Freem. Ch. R. 53; *Lord Barnard's case*, Prec. Ch. 454; S. C. 2 Vern. 738; *Aston v. Aston*, 1 Ves. 265; *Clement v. Wheeler*, 5 Foster, 361.

² *Clement v. Wheeler*, 5 Foster, 361.

³ *Ibid.*; *Eden on Injunct.* ch. 9, p. 177 to 186; *Burgess v. Lamb*, 16 Ves. 185, 186; *Marquis of Downshire v. Sandys*, 6 Ves. 107; *Lord Tamworth v. Lord Ferrers*, 6 Ves. 419; *Day v. Merry*, 16 Ves. 375; *Attorney-General v. Duke of Marlborough*, 3 Madd. R. 539, 540; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (p); 3 Wooddes. Lect. 56, p. 402, 403; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 333 to 336; *Wellesley v. Wellesley*, 6 Sim. R. 497.

⁴ [*Briggs v. Earl of Oxford*, 8 Eng. Law & Eq. Rep. 194. See *Kekewich v. Marker*, 3 Mac. & Gord. 311; S. C. 5 Eng. Law and Eq. Rep. 129.]

⁵ *Eden on Injunct.* ch. 9, p. 171, 172; *Twort v. Twort*, 16 Ves. 128, 131; *Hole v. Thomas*, 7 Ves. 589, 590; *Hawley v. Clowes*, 2 Johns. Ch. R. 122. The statute of Westminster 2d, ch. 22, provided a remedy for tenants in common and joint tenants in many cases of waste, by providing that, upon an action of waste, the offending party should make an election to take the part wasted in his purparty, or to find surety to take no more than belonged to his share. But this statute only applied to cases of freehold.

has in a great measure, fallen into disuse. The action of waste is of rare occurrence in modern times;¹ an action on the case for waste being generally substituted in its place, whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious, and complete, that it is almost invariably resorted to.² By such a bill, not only may future waste be prevented, but, as we have already seen, an account may be decreed, and compensation given for past waste.³ Besides, an action on the case will not lie at law for permissive waste;⁴ but in equity an injunction will be granted to restrain permissive waste, as well as voluntary waste.⁵

§ 918. The interference of courts of equity in restraint of waste was originally confined to cases founded in privity of title; and for the plaintiff to state a case, in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under an adverse right, was said to be, for the plaintiff to state himself out of court. But at present the courts have, by insensible degrees, enlarged the jurisdiction to reach cases of adverse claims and rights, not founded in privity; as, for instance, to cases of trespass, attended with irreparable mischief, which we shall have occasion hereafter to consider.⁶

[* § 918 *a*. In the late case of *Earl Talbot v. Scott*,⁷ this subject is very considerably examined by the Vice-Chancellor. This learned judge, from a review of the cases, confirms the decision in *Haigh v. Jaggar*,⁸ where it is said, that if one be in full and complete possession of an estate, by a title adverse to the plaintiff, and there be no privity between them, and the party in possession swear that his title is valid and that of the plaintiff invalid, and

¹ *Harrow School v. Alderton*, 2 Bos. & Pull. 86; *Redfern v. Smith*, 1 Bing. R. 382; 2 Bing. R. 262.

² *Eden on Injunct.* ch. 9, p. 159.

³ *Ante*, § 515 to 518; *Eden on Injunct.* ch. 9, p. 159, 160; *Id.* ch. 40, p. 206 to 219.

⁴ *Gibson v. Wells*, 4 Bos. & Pull. 290; *Herne v. Beabow*, 4 Taunt. R. 764.

⁵ *Eden on Injunct.* ch. 9, p. 159, 160; *Caldwall v. Baylis*, 2 Meriv. R. 408; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*p*).

⁶ See the cases fully collected by Mr. Eden. *Eden on Injunct.* ch. 9, p. 191 to 196, ch. 10, p. 206 to 214; *Livingston v. Livingston*, 6 Johns. Ch. R. 497; *Smith v. Collyer*, 8 Ves. 90. [* But see *Bogey v. Shute*, 4 Jones, Eq. R. 174.

⁷ 4 Kay & Johnson, 96.

⁸ 2 Collyer, 231. See *Neale v. Cripps*, 4 Kay & J. 472.]

unjust, this will not prevent a court of equity from interfering, before judgment, at law, or decree in equity, to restrain the party in possession from committing waste upon the inheritance. But in the first case the rule is restricted to cases of fraud, and where the waste is malicious and destructive, and irreparable, by any proceeding at law.]

§ 919. The jurisdiction, then, of courts of equity, to interpose, by way of injunction, in cases of waste, may be referred to the broadest principles of social justice. It is exerted, where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief;¹ and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter. On the other hand, courts of equity will often interfere in cases where the tenant in possession is impeachable for waste, and direct timber to be felled, which is fit to be cut, and in danger of running into decay, and thus will secure the proceeds for the benefit of those who are entitled to it.²

[* § 920. Next in order we shall consider nuisances. These are public and private.]

§ 921. In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth.³ The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. Purpresture, according to Lord Coke, signifies a close, or enclosure, that is, when one encroaches, or makes that several to himself, which ought to be common to many.⁴ The term was, in the old law-writers, applied to cases of encroachment, not only upon the king, but upon subjects. But, in its common acceptation, it is now understood to mean an encroachment upon the king, either

¹ *Watson v. Hunter*, 5 Johns. Ch. R. 170; *Jeremy on Equity Jurisd.* B. 3, ch. 2, § 1, p. 327, 328; *Winship v. Pitts*, 3 Paige, R. 259.

² See *Eden on Injunct.* ch. 10, p. 218 to 221; *Burges v. Lamb*, 16 Ves. 182; *Mildmay v. Mildmay*, 4 Bro. Ch. R. 76; *Delapole v. Delapole*, 17 Ves. 150; *Osborne v. Osborne*, cited 19 Ves. 423; *Wickham v. Wickham*, 19 Ves. 419, 423 *Cooper*, R. 288.

³ *Eden on Injunct.* ch. 11, p. 224, 225.

⁴ 2 Inst. 38, 272.

upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations.¹

§ 922. In cases of purpresture, the remedy for the crown is either by an information of intrusion at the common law, or by an information at the suit of the attorney-general in equity. In the case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture, without being at the same time a nuisance, the court may direct an inquiry to be made, whether it is most beneficial to the crown, to abate the purpresture, or to suffer the erections to remain and be arrested.² But if the purpresture be also a public nuisance, this cannot be done; for the crown cannot sanction a public nuisance.³

§ 923. In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. The instances of the interposition of the court, however, are (it is said) rare, and principally confined to informations seeking preventive relief. Thus, informations in equity have been maintained against a public nuisance by stopping a highway. Analogous to that, there have been many cases in the Court of Exchequer of nuisance to harbors, which are a species of highway. If the soil belongs to the crown, there is a species of remedy for the purpresture above mentioned for that. If the soil does not belong to the crown, but it is merely a common nuisance to all the public, an information in equity lies. But the question of nuisance or not, must, in cases of doubt, be tried by a jury; and the injunction will be granted or not, as that fact is decided.⁴

¹ Ibid.; Hale in Harg. Law Tracts, ch. 8, p. 74, 78; Trustees of Watertown v. Cowen, 4 Paige, R. 510, 514, 515; Commonwealth v. Wright, 3 Amer. Jur. 185; City of New Orleans v. U. States, 10 Peters, R. 662; Attorney-General v. Forbes, 2 Mylne & Craig, 123; Earl of Ripon v. Hobart, 3 Mylne & Keen, 169, 179, 180, 181; Mohawk Bridge Company v. Utica and Schenectady Railroad Company, 6 Paige, R. 554; Attorney-General v. Cohoes Company, 6 Paige, R. 133.

² Mitf. Eq. Pl. by Jeremy, 145; Eden on Injunct. ch. 11, p. 223, 224; Hale in Harg. 81; Attorney-General v. Richards, 2 Anstr. R. 603, 606; Attorney-General v. Johnson, 2 Wilson, Ch. R. 101 to 103.

³ Ibid.

⁴ Attorney-General v. Cleaver, 18 Ves. 217, 218; Crowder v. Tinkler, 19 Ves.

And the court, in the exercise of its jurisdiction, will direct the matter to be tried upon an indictment, and reserve its decree accordingly.¹

§ 924. The ground of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisances, undoubtedly is, their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations.² In the first place they can interpose, where the courts of law cannot, to restrain and prevent such nuisances, which are threatened, or are in progress, as well as to abate those already existing.³ In the next place, by a perpetual injunction, the remedy is made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance; and for future acts new prosecutions must be brought. In the next place, the remedial justice in equity may be prompt and immediate, before irreparable mischief is done; whereas, at law, nothing can be done, except after a trial, and upon the award of judgment. In the next place, a court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties,⁴ directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the attorney-general.⁵

620, 622; *Barnes v. Baker*, Amb. R. 158; *Eden on Injunct.* ch. 11, p. 223, 224, 230, 235 to 237; *Mitf. Eq. Pl. by Jeremy*, 145; *Attorney-General v. Forbes*, 2 Mylne & Craig, R. 143; *Mohawk Bridge Company v. Utica and Schenectady Railroad Co.* 6 Paige, R. 554; *Attorney-General v. Cohoes Company*, 6 Paige, R. 133.

¹ *Ibid.* But see *Earl of Ripon v. Hobart*, 1 Cooper, Sel. Cas. 333; S. C. 3 Mylne and Keen, 164, 179, 180.

² *Mitf. Eq. Pl. by Jeremy*, 144, 145; *Attorney-General v. Johnson*, 2 Wilson, Ch. R. 101, 102.

³ *Attorney-General v. Johnson*, 2 Wilson, Ch. R. 101, 102.

⁴ See *Soltau v. De Held*, 9 Eng. Law & Eq. R. 104.

⁵ *Eden on Injunct.* ch. 11, p. 230; *Crowder v. Tinkler*, 19 Ves. 617, 623; *Attorney-General v. Johnson*, 2 Wills. Ch. R. 87, 102, 103; *Corning v. Lowerre*, 6 Johns. Ch. R. 439; *Attorney-General v. Forbes*, 2 Mylne & Craig, 129, 130. On this occasion Lord Cottenham said: "With respect to the question of jurisdiction, it was broadly asserted, that an application to this court to prevent a nuisance to a public road was never heard of. A little research, however, would have found many such instances. Many cases might have been produced, in which the court has interfered to prevent nuisances to public rivers and to public harbors. And the Court of Exchequer, as well as this court, acting as a court of equity, has a

§ 924 *a*. But in all cases of this sort, courts of equity will grant an injunction to restrain a public nuisance, only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition.¹ And, indeed, the same

well-established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads; and, in short, generally to prevent public nuisances. In *Box v. Allen*, this court interfered to stay the proceedings of parties, whose jurisdiction is quite as high as that of the Court of Quarter-Sessions over bridges, namely, the Commissioners of Sewers. Those commissioners possess a jurisdiction founded on acts of Parliament, and they have a right, within the due limits of their authority, to do all necessary acts in the execution of their functions. Nevertheless, if they so execute what they conceive to be their duty, as to create or occasion a public nuisance, this court has an undoubted right to interpose. The same question occurred in *Kerrison v. Sparrow*, before Lord Eldon, in which his lordship, under the circumstances of the case, considered that he ought not to interfere; but the jurisdiction of the court was not there denied or disputed. In *Attorney-General v. Johnson*, the objection to the jurisdiction was attempted to be raised. The defendants in that case, the Corporation of the City of London, were authorized by act of Parliament to do what was necessary to be done in the exercise of their duty, as conservators of the River Thames. But, in that particular instance, they had assumed to themselves a right to carry on or sanction operations, which created a nuisance to the king's subjects; and the court accordingly interfered to prevent them from so exercising their undoubted legal powers. To say that this court, when it interferes in such a case, is acting as a court of appeal from the Court of Quarter-Sessions, is anything but a correct representation of the fact. The jurisdiction is exercised not for the purpose of overruling the power of others, by way of appeal from their authority, but for the purpose of exerting a salutary control over all, for the protection of the public." See, also, *Spencer v. London and Birmingham Railway Company*, 8 Sim. R. 193; *Sampson v. Smith*, 8 Sim. R. 272.

¹ See *Drake v. Hudson River Railroad Co.* 7 Barbour, S. C. R. 508. *Hamilton v. The New York and Harlem Railroad*, 9 Paige, 171; *Earl of Ripon v. Hobart*, 1 Cooper, Sel. Cas. 333; S. C. 3 Mylne & Keen, 169. In this last case Lord Brougham said: "In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction, as applied to such cases as this. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the mean time continued. But, where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere, until the matter has been tried at law, generally by an action, though in particular cases an issue may

doctrine is equally applicable to cases of private nuisance.¹ But when private individuals suffer an injury quite distinct from that of the public in general, in consequence of a public nuisance, they will be entitled to an injunction and relief in equity, which may thus compel the wrongdoer to take active measures against allowing the injury to continue.²

be directed for the satisfaction of the court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property, which are *primâ facie* harmless or even praiseworthy, is equally manifest. And it is always to be borne in mind, that the jurisdiction of this court over nuisance by injunction at all, is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared may be referred to in support of the proposition which I have stated; as in the *Attorney-General v. Nichol*, 16 Ves. 338; *Attorney-General v. Cleaver*, 18 Ves. 211; and an anonymous case before Lord Thurlow, in 1 Ves. Jr. 140, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance. But some authorities approach very near the ground upon which I have relied. Lord Hardwicke, in *Attorney-General v. Doughty*, 2 Ves. Sen. 453, speaks of plain nuisances, and a plain case of nuisance, as contradistinguished from others, and entitling the court to grant an injunction before answer. Lord Eldon appeared at one time (*Attorney-General v. Cleaver*) to think, that there was no instance of an injunction to restrain nuisance without trial. But though this cannot now be maintained, it is clear that in other cases, where there appeared a doubt, as in *Chalk v. Wyatt*, 3 Mer. 688, the injunction was said only to be granted, because damages had been recovered at law. The course which has been pursued at law, with respect to different kinds of obstructions and other violations of right, furnishes a strong analogy of the same kind. Lord Hale, in a note to Fitzherbert's *Nat. Brev.* 184 a, speaking of a market holden in derogation of a franchise, says, that if it be kept on the same day, it shall be intended a nuisance; but if it be on another day, it shall be put to issue, whether it be a nuisance or not. And the case of *Yard v. Ford*, 2 Saund. 172, seems to recognize the same distinction." See *Mohawk Bridge Company v. Utica and Schenectady Railroad Company*, 6 Paige, R. 559, 563; *Spencer v. London and Birmingham Railway Company*, 8 Sim. 193.

¹ *Ibid.*; *Hart v. Mayor of Albany*, 3 Paige, R. 210, 213.

² *Spencer v. London and Birmingham Railway Company*, 8 Sim. R. 193; *Catlin v. Valentine*, 9 Paige, R. 575. See *Sampson v. Smith*, 8 Sim. R. 272; *Soltau*

§ 925. In regard to private nuisances, the interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits.¹ It is not every case, which will furnish a right of action against a party for a nuisance, which will justify the interposition of courts of equity to redress the injury or to remove the annoyance. But there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction.² Thus, it has been said, that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, in such a case an injunction ought to be granted, to restrain the person from committing it.³ So, a mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.⁴

[* § 925 *a*. The propriety of restraining a private nuisance by injunction is extensively discussed by the Lord Chancellor, in a recent English case.⁵ That was the case of the plaintiff's market-
v. De Held, 9 Eng. Law & Eq. R. 104; *Smith v. Lockwood*, 13 Barbour, 209; *Lamborn v. The Covington Company*, 2 Md. Ch. Dec. 409.

¹ Mitf. Eq. Pl. by Jeremy, 144, 145; *Eden on Injunct.* ch. 11, p. 231 to 238; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 309.

² *Fishmonger's Company v. East India Company*, 1 Dick. 163, 164; *Attorney-General v. Nichol*, 16 Ves. 342; *Corporation of New York v. Mapes*, 6 Johns. Ch. R. 46; *Mohawk and Hudson Railroad Company v. Artcher*, 6 Paige, R. 83; *Fisk v. Wilber*, 7 Barbour, R. 400; *Dana v. Valentine*, 5 Metc. 8, 118; *Bruce v. President, &c. of Delaware Canal Co.* 19 Barbour, 378.

³ *Coulson v. White*, 3 Atk. 21.

⁴ *Attorney-General v. Nichol*, 16 Ves. 342; *Wynstanley v. Lee*, 2 Swanst. R. 336; *Earl of Ripon v. Hobart*, 3 Mylne & Keen, 169; S. C. 1 Cooper, Sel. Cas. 333.

⁵ [* *Broadbent v. Imperial Gas Co.* 7 De G. M. & G. 436. See, also, *The Attorney-General v. Birmingham*, 4 Kay & J. 528. It is here decided that the public works for the preservation of health in a great city must not be so conducted as materially to infringe private rights. And that a court of equity will restrain, by injunction, the municipal authorities from conducting the sewage of a city into a river in such a manner as to render the water unfit for the use of cattle seven miles below, and where it belonged to the plaintiff. See, also, *The Manchester, Sheffield, &c. Railw. Co. v. The Workshop Board of Health*, 23 Beavan, 198.

garden being seriously damaged by the noxious vapors and smoke issuing from the defendants' works. He brought an action for the injury, which, upon the suggestion of the judge, was referred to an arbitrator, who awarded a sum to be paid by the defendants as compensation for past injury, no evidence being offered in regard to any prospective damage. Judgment was entered upon the award, a verdict having been taken for the amount. The company subsequently increased their works; and it was held, that plaintiff was entitled to a perpetual injunction to restrain the further manufacture of the gas in a manner injurious to his crops; and that the former action and award and judgment had established the plaintiff's right, the same as the verdict of a jury.

§ 925 b. The question what is a nuisance is one peculiarly fitted for the investigation of a jury; and in an ordinary case, where the event of a suit in equity depends upon a legal right, that right must be ascertained, in an action at law, before any relief can be granted in a court of equity.¹ But the court will retain the bill until after the trial of the question at law.²

§ 925 c. Where there is good reason to conclude that the present nuisance complained of is temporary, the court will not grant a temporary injunction, in order that the plaintiff may bring an action at law which may be nugatory.³

§ 925 d. Where equitable relief by way of injunction is sought, in aid of a legal right, the court, unless such right is clear, will not, except by consent of both parties, declare the legal rights and grant an injunction founded on such declaration, but will require the question to be tried at law.⁴ In this case the defendants

But equity will not enjoin what is claimed as a nuisance, until the plaintiff's right is established by a judgment at law, if there is any serious question, unless the damage is new, and if continued will be irreparable. *Coe v. Lake Co.* 37 N. H. R. 254. It has been held that parties suffering special damage in the value and use of their property, by the use of adjoining property for unlawful purposes, as for a brothel, may be relieved by injunction. *Hamilton v. Whitridge*, 11 Md. R. 128.

¹ *Attorney-General v. United Kingdom Electric Telegraph Co.* 5 Law T. N. S. 338.

² *Ibid.*

³ *Cleeve v. Mahany*, 9 W. R. 882. The application here was by the owner of houses, for an injunction, on the ground of nuisance to the inhabitants of such houses, and the court declined to interfere by temporary injunction, because there was no testimony from such inhabitants in support of the application.

⁴ *Cardiff (Mayor, &c.) v. Cardiff Waterworks Co.* 4 De G. & J. 596.

claimed a right under an act of Parliament, and the Vice-Chancellor granted a perpetual injunction, but the court held, on appeal, that, it not being clear, on the construction of the act, that it did not authorize what the defendant proposed to do, he was entitled to the opinion of a court of common law upon the question.¹ But in the American States this rule of the English law, requiring the plaintiff's legal rights to be first established in a court of law, before a court of equity will interfere, is not so strictly adhered to as in the English courts, we apprehend. The reason may be found partly in the fact, that more commonly the same judges administer both legal and equitable remedies, and partly also in the general feeling that the rights of all parties are likely to be equally well protected in either class of tribunals.

§ 925 *e*. Where one sold a piece of land and covenanted for quiet enjoyment, and afterwards so raised the water in a brook running past the land, the same running also through the other land of the seller, as injuriously to affect such land so sold by him, it was held that this was not a proper subject of complaint for the interference of a court of equity.²

§ 925 *f*. In a very recent case in New Hampshire,³ the subject of the interference of courts of equity to suppress nuisances is considerably discussed. It is here said: Ordinarily courts of equity will exercise concurrent jurisdiction with courts of law in cases of private nuisance, only when they can restrain irreparable mischief, suppress interminable litigation, and prevent a multiplicity of suits. And in such cases courts of equity will not, ordinarily, take upon themselves to decide the fact that a nuisance exists, when that is controverted, but will require the party seeking the interference of the court first to establish his right at law. But in cases where the plaintiff has been long in the exercise of his right, or where delay would be disastrous, the court will not require the right to be first established at law.⁴ Rights to water power stand on no higher claim to equitable interference than others; but where water-power rights have been established at law, as existing in more than one party, courts of equity will entertain jurisdiction

¹ Cardiff (Mayor, &c.) *v.* Cardiff Waterworks Co. 4 De G. & J. 596.

² Ingram *v.* Morecraft, 33 Beav. 49.

³ Burnham *v.* Kempton, 3 Am. Law Reg. N. S. 380.

⁴ Falls Village W. P. Co. *v.* Tibbetts, 31 Conn. 165. See, also, Rhode Island Exch. Bank *v.* Hawkins, 6 R. I. 198.

to regulate the use of the water, and determine the relative proportion and precedence of the different proprietors, but not where this is made a cloak to try the right.

§ 925 *g*. And in a case between The Niagara Falls International Bridge Company and the Great Western Railway Company,¹ it was held that a court of equity will restrain acts in violation of an agreement, where the injury to the plaintiffs would be irreparable, and the recovery of damages at law no adequate redress.

§ 925 *h*. It was considered by the United States Supreme Court, in the important case of *Mississippi and Missouri Railway v. Ward*,² that the rule of law is, that a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and if it leaves a reasonable space for the passage of vessels it is not indictable as a nuisance, nor will a court of equity interpose to remove it. And the court of chancery in New Jersey declined to interfere, by injunction, to restrain the building of a new bridge within the exclusively prescribed limits contained in the charter of an existing bridge, where it appeared, from the answer, that the complainants' bridge had been so far appropriated to the uses of a railway as to render it inconvenient and dangerous for ordinary travel.³

§ 926. On the other hand, where the injury is irreparable, as, where loss of health,⁴ loss of trade,⁵ destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection; in every such case courts of equity will interfere by injunction, in furtherance of justice and the violated rights of the party.⁶ Thus, for example, where a party builds so near the house of another party, as to darken his windows, against the clear rights of the latter either by contract, or by ancient possession, courts of equity will interfere by injunc-

¹ 39 Barb. S. C. 212; 3 Am. Law Reg. 122.

² 2 Black. 485.

³ *Trenton Bridge v. Trenton City Bridge*, 2 Beasley, 46.]

⁴ *Howard v. Lee*, 3 Sandf. S. C. R. 281, a case of chandlery. *Peck v. Elder*, 3 Sandf. S. C. R. 126, a slaughter-house. *Walter v. Selfe*, 4 Eng. Law & Eq. R. 15, a case of brick-burning. See *Davidson v. Isham*, 1 Stockton, Ch. R. 186.

⁵ *Gilbert v. Mickle*, 4 Sandf. Ch. R. 357.

⁶ *Wynstanley v. Lee*, 2 Swanst. R. 335; *Attorney-General v. Nichol*, 16 Ves. 342; *Cherrington v. Abney*, 2 Vern. 646; *Earl Bathurst v. Burden*, 2 Bro. Ch. R. 64; *Nutbrown v. Thornton*, 10 Ves. 163; *Mohawk and Hudson Railroad Co. v. Artcher*, 6 Paige, R. 83.

tion to prevent the nuisance, as well as to remedy it, if already done, although an action for damages would lie at law; for the latter can in no just sense be deemed an adequate relief in such a case.¹ The injury is material, and operates daily to destroy or diminish the comfort and use of the neighboring house; and the remedy by a multiplicity of actions, for the continuance of it, would furnish no substantial compensation.

§ 926 *a*. The same rule will apply to cases, where blocks of buildings have been erected, with particular covenants respecting the enjoyment thereof, and the erection of livery-stables,² slaughter-houses, glue factories, and other special privileges or inconveniences; for in such cases, each purchaser or owner of one of the block will be entitled to an injunction to prevent the breach, and to enforce the observance of such covenants, since they are for the mutual benefit and protection of all the owners and purchasers in the block.³ [Thus, where the owners of adjoining lots on a public street orally agreed to erect their houses eight feet from the line of the street, and leave an open space or court-yard in front, which agreement was carried into effect by the erection accordingly, a subsequent purchaser of one of the lots was enjoined from building on the open space; ⁴ but if the agreement had not been executed, it must have been in writing in order to be valid.⁵ So, the erection of a private building upon land reserved for a public square, and which has been illegally sold by the public authorities, is a nuisance of such irreparable nature, as to give a court jurisdiction to grant a perpetual injunction.⁶]

§ 927. Cases of a nature calling for the like remedial interposition of courts of equity, are, the obstruction [or pollution⁷] of watercourses, the diversion of streams from mills,⁸ the back flow-

¹ *Ibid.*; *Eden on Injunct.* ch. 11, p. 231, 232; *Back v. Stacy*, 2 Russ. R. 121. See *Atkins v. Chilson*, 7 Met. 398; *Robenson v. Pittenger*, 1 Green, Ch. R. 57; *Irwin v. Dixon*, 9 How. U. S. R. 10; *Post*, § 927.

² *Coker v. Birge*, 10 Geo. 336.

³ *Barrow v. Richards*, 8 Paige, R. 351; *Duke of Bedford v. The Trustees of the British Museum*, 2 Sugden on Vendors, App'x, p. 361 (9th edit.); S. C. cited 8 Paige, R. 354. See *Williams v. Earl of Jersey*, 1 Craig & Phillips, R. 91; *Wells v. Chapman*, 13 Barbour, 173; *Ante*, § 729; *Post*, § 959 *a*.

⁴ *Tallmadge v. East River Bank*, 2 Duer, 614.

⁵ *Wolfe v. Frost*, 4 Sandf. Ch. R. 72.

⁶ *The Commonwealth v. Rush*, 14 Penn. St. R. 186.

⁷ *Lewis v. Stein*, 16 Ala. 214; *Wood v. Sutcliffe*, 8 Eng. Law & Eq. R. 217.

⁸ See *Fisk v. Wilber*, 7 Barbour, R. 395; *Olmstead v. Loomis*, 6 Barbour, R.

age on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation, or adjacent mills to destruction.¹ So, where easements or servitudes are annexed by grant or covenant, or otherwise, to private estates; or, where privileges of a public nature, and yet beneficial to private estates, are secured to the proprietors, contiguous to public squares, or other places, dedicated to public uses; the due enjoyment of them will be protected against encroachments by injunction.² So, an injunction will be granted against a corporation, to prevent an abuse of the powers granted to them to the injury of other persons.³ So,

152; *Burden v. Stein*, 27 Ala. 104; *Frink v. Lawrence*, 20 Conn. 117; [* *Toulumne Water Co. v. Chapman*, 8 Cal. 392.]

¹ *Robinson v. Byron*, 1 Bro. Ch. R. 588; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 706; *Lane v. Newdigate*, 10 Ves. 194; *Chalk v. Wyatt*, 3 Meriv. R. 688; *Martin v. Stiles*, Mosel. R. 145; *Gardner v. Village of Newburg*, 2 Johns. Ch. R. 165; *Van Bergen v. Van Bergen*, 2 Johns. C. R. 272; *S. C.* 3 Johns. Ch. R. 282; *Hammond v. Fuller*, 1 Paige, R. 197; *Arthur v. Case*, 1 Paige, R. 448; *Belknap v. Trimble*, 3 Paige, R. 577, 600, 601; *Reid v. Gifford*, 1 Hopkins, R. 416.

² *Hills v. Miller*, 3 Paige, R. 254; *Corning v. Lowerre*, 6 Johns. Ch. R. 439; *Trustees of Watertown v. Cowen*, 4 Paige, R. 510, 514.

³ *Coates v. The Clarence Railway Company*, 1 Russ. & Mylne, 181. This principle was strongly exemplified in the case of *Bonaparte v. Camden and Amboy Railroad Company*, 1 Baldwin's Cir. R. 231, where a bill was brought to prevent a railroad company from illegally appropriating the lands of the plaintiff. On this occasion Mr. Justice Baldwin said: "The injury complained of, as impending over his property, is, its permanent occupation and appropriation to a continuing public use, which requires the divestiture of his whole right, its transfer to the company in full property, and its inheritance to be destroyed, as effectively as if he had never been its proprietor. No damages can restore him to his former condition; its value to him is not money, which money can replace; nor can there be any specific compensation or equivalent; his damages are not pecuniary (*vide* 7 Johns. Ch. 731); his objects in making his establishment were not profit, but repose, seclusion, and a resting-place for himself and family. If these objects are about to be defeated, if his rights of property are about to be destroyed, without the authority of the law; or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law, for a trespass, a court of equity will enjoin its commission." In the same case it was held, that, although an act of the legislature, appropriating private lands to public uses, without compensation first being awarded, was not unconstitutional, yet a court of equity would issue an injunction against the actual possession of the lands until compensation was made. 1 Baldwin, Cir. Rep. 226 to 230. See also *Mohawk and Hudson Railroad Company v. Artcher*, 5 Paige, R. 83.

an injunction will be granted against the erection of a new ferry, injurious to an old established ferry.¹ [So, to restrain the ringing of bells by a Roman Catholic community, although the same was done only on Sundays.²] So, an injunction will be granted in favor of a turnpike corporation, to secure the due enjoyment of their privileges, by preventing the establishment of short by-roads, (commonly called shunpikes), to destroy their tolls.³ So (as we have seen), an injunction will lie to prevent the darkening or obstruction of ancient lights of a dwelling-house.⁴ So, to prevent a party from making erections on an adjacent lot in violation of his covenant or other contract.⁵ So, to prevent the erection of a statue upon a public street or square, if it be clearly in violation of a covenant or other contract.⁶ So, to prevent a voluntary religious association from being disturbed in their burial-ground.⁷ So, to prevent rights of possession and property being injured, obstructed, or taken away illegally by a railroad company.⁸ So, to prevent a tenant from removing mineral and other deposits from the bed of a stream running through a farm which he occupies.⁹ So, an injunction will be granted in favor of parties, possessing a statute privilege or franchise, to secure the enjoyment of it from invasion

¹ Com. Dig. Chancery, D. 12; *Newburg Turnpike Company v. Miller*, 5 Johns. Ch. R. 101, 111; *Ogden v. Gibbons*, 4 Johns. Ch. R. 159, 160.

² *Soltau v. De Held*, 9 Eng. Law & Eq. R. 104.

³ *Croton Turnpike Company v. Ryder*, 1 Johns. Ch. R. 615; *Williams v. N. Y. Central Railroad Co.* 18 Barbour, 222; *Hentz v. Long Island Railroad Co.* 13 Id. 646; *Auburn and Cato Plank Road Co. v. Douglass*, 12 Barbour, 553; *Harrell v. Ellsworth*, 17 Ala. 576.

⁴ *Sutton v. Montfort*, 4 Sim. R. 559; *Back v. Stacy*, 2 Russ. &c. 121; *Wynstanley v. Lee*, 2 Swanst. R. 333; *Attorney-General v. Nichol*, 16 Ves. 338; *Morris v. Berkley's Lessees*, 2 Ves. 453; *Fishmonger's Co. v. East India Co.* 1 Dick. 163; *Corning v. Lowerre*, 6 Johns. Ch. R. 439; *Ante*, § 926.

⁵ *Ranken v. Huskisson*, 4 Sim. R. 13; *Squire v. Campbell*, 1 Mylne & Craig, 480, 481; *Roper v. Williams*, 1 Turn. & Russ. R. 18.

⁶ *Squire v. Campbell*, 1 Mylne & Craig, R. 459, 477 to 486; *Heriot's Hospital (Feoffees of) v. Gibson*, 2 Dow, R. 301, 304.

⁷ *Beatty v. Kurtz*, 2 Peters, R. 566, 584.

⁸ *Bonaparte v. Camden and Amboy Railroad Company*, 1 Bald. Cir. R. 231. [But a railroad is not *per se* a nuisance; and a strong case must be presented, to justify issuing an injunction against a railroad company. *Drake v. The Hudson River Railroad Company*, 7 Barbour, S. C. R. 508; *Lexington, &c. Co. v. Applegate*, 8 Dana, 289; *Hamilton v. The New York and H. Railroad*, 9 Paige, 171; 4 Eds. Ch. 411.]

⁹ *Thomas v. Jones*, 1 Y. & Coll. New R. 510.

by other parties.¹ In all cases of this sort, if the right be doubtful, the court will direct it to be tried at law; and will, in the mean time, restrain all injurious proceedings.² And when the right is fully established, a perpetual injunction will be decreed.³

[* § 927 a. And it is upon similar grounds that courts of equity interfere by injunction to restrain adjoining land-owners from so digging in the soil of their own land, as to endanger their neighbors' buildings. In a recent English case this subject is very extensively examined, and the cases elaborately reviewed by counsel.⁴ The conclusion of the court was, that a land-owner has a right, independent of prescription, to the lateral support of his neighbors' land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damages caused, either to the land or buildings upon it, by the withdrawal of such support. And it would seem that he may acquire, by twenty years' enjoyment, the right to lateral support for the additional weight of buildings erected on the land. And where houses of the plaintiff were injured by mining operations of the defendant, in adjoining land, which would have caused the soil to subside without the additional weight of the houses, a decree for perpetual injunction, and for compensation, was granted. The following cases were relied upon in argument.⁵]

¹ *Ogden v. Gibbons*, 4 Johns. Ch. R. 150; *Livingston v. Ogden*, 4 Johns. Ch. R. 48.

² *Ante*, § 924 a; *Jordan v. Woodward*, 38 Maine, 423.

³ *Jeremy* on Eq. B. 3, ch. 2, § 1, p. 310; *Ryder v. Bentham*, 1 Ves. 543; *Eden* on Injunct. ch. 11, p. 235, 236; *Anon.* 2 Ves. 414; *Reid v. Gifford*, 6 Johns. Ch. R. 19; *Osborn v. Bank of U. S.* 9 Wheat. R. 738; *Hart v. Mayor of Albany*, 3 Paige, R. 213; *Livingston v. Livingston*, 6 Johns. Ch. R. 497, and the cases there cited.

⁴ [* *Hunt v. Peake*, Johnson, 705.

⁵ *Caledonian Railway Co. v. Sprot*, 2 McQueen's H. L. C. 449; *Humphries v. Brogden*, 12 Queen's Bench, 739; *Rawbotham v. Wilson*, 6 El. & Bl. 593; *Arkwright v. Gell*, 5 M. & W. 203; *Acton v. Blundell*, 12 M. & W. 324; *Dickinson v. Grand J. Canal Co.* 7 Exch. R. 282; *Chasemore v. Richards*, 7 W. R. 685; *Solomon v. Vintners' Company*, 7 W. R. 613; S. C. 28 L. J. Exch. 370, and some other cases, many of which are discussed by the learned Vice-Chancellor, in giving judgment. The same subject is again brought under review, in *Hunt v. Peake*, 6 Jur. N. S. 1071, and a query suggested, whether the owner of an ancient house is entitled to the lateral support of his neighbor's land for such house. This last case was decided by Vice-Chancellor Wood, as late as February, 1860, so that the long-recognized right of easement, as it has been called, to lateral support for buildings erected more than twenty years upon one's land, seems to be very seri-

§ 928. It is upon similar grounds, that courts of equity interfere in cases of trespasses, that is to say, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation.¹ For, if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But, now, there is not the slightest hesitation, if the acts done, or threatened to be done, to the property, would be ruinous or irreparable, or would impair the just enjoyment of the property in future.² If, indeed, courts of equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice in the country.³

ously questioned in the English courts, although the existence of the rule in the civil law is not there doubted, or its constant recognition in the English courts from the earliest times. It seems not a little singular that it should be brought in question at this late day. But the right to ancient lights, without obstruction from an adjoining proprietor, seems not to be questioned in England, while in this country it is wellnigh abandoned, upon the ground, that the mere use of light is no intrusion upon the rights of the adjoining proprietor, and consequently, no ground of implying an acquiescence on his part. *Fifty Associates v. Tudor*, 6 Gray, R. 255; *Haverstick v. Sipe*, 33 Penn. St. R. 368; *Cherry v. Stein*, 11 Md. R. 1. But in a late case, *Wilson v. Townend*, 6 Jur. N. S. 1109, an intimation is given, that where ancient windows have been enlarged or altered, the right of easement is gone. See *Bononi v. Backhouse*, 5 Jur. N. S. 1345. And in the case of *Arcedeckne v. Kelk*, 5 Jur. N. S. 114, an injunction to restrain the interruption of ancient lights was granted, upon condition of the plaintiff undertaking to bring an action at law within one month; and a query is made, whether, when the owner of a house has by his own act, at any time during twenty years, made an obstruction as great as that in respect of which he seeks relief, the court would interfere.]

¹ Cooper, Eq. Pl. 152, 153, 154; Mitf. Eq. Pl. by Jeremy, 137; *Hanson v. Gardiner*, 7 Ves. 308, 309, 310; *Norway v. Rowe*, 19 Ves. 147, 148, 149; *New York Printing and Dyeing Estab. v. Fitch*, 1 Paige, R. 97; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 311, 312.

² *Géorges Creek Company v. Detmold*, 1 Md. Ch. Dec. 375.

³ *Hanson v. Gardiner*, 7 Ves. 306 to 308; *Courthope v. Mapplesden*, 10 Ves. 291; *Field v. Beaumont*, 1 Swanst. 207, 208; *Crockford v. Alexander*, 15 Ves. 138; *Thomas v. Oakley*, 18 Ves. 184. Lord Eldon has, on many occasions, alluded to this change or enlargement of equity jurisdiction; and especially in *Hanson v. Gardiner*, 7 Ves. 310, 311, and *Thomas v. Oakley*, 18 Ves. 184. In the latter case he said: "The distinction, long ago established, was that, if a person, still living, committed a trespass by cutting timber, or taking lead ore, or coal,

§ 929. Thus, for instance, where a mere trespasser digs into and works a mine, to the injury of the owner, an injunction will be granted, because it operates a permanent injury to the property, as a mine.¹ [So, where a land-owner is excavating his own lot fifty feet deep and removing the earth to make brick, whereby an adjoining owner's land falls in, from its own weight alone, he may be restrained by injunction.²] So, where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land.³ So, where there is a dispute respecting the boundaries of estates, and one of the claimants is about to cut down ornamental or timber trees in the disputed territory.⁴ So, where a party who is in possession under articles, is proceeding to cut down timber trees.⁵ So, where lessees are taking away from a manor, border-

this court would not interfere; but gave the discovery; and then any action might be brought for the value discovered. But the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value; though the law gave no remedy. In that instance, therefore, the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged; and I have frequently alluded to the case, upon which Lord Thurlow first hesitated. A person having a close demised to him, began to get coal there; but continued to work under the contiguous close, belonging to another person. And it was held, that the former, as waste, would be restrained; but as to the close, which was not demised to him, it was a mere trespass; and the court did not interfere. But I take it that Lord Thurlow changed his opinion upon that; holding, that, if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which in equity he was entitled. The interference of the court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction, as to both. That has since been repeatedly followed; and, whether it was trespass under the color of another's right actually existing or not. If this protection would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages." See also *Livingston v. Livingston*, 6 Johns. Ch. R. 497, 498, 499, where Mr. Chancellor Kent has, with his usual ability, commented on the cases at large.

¹ Case cited in 7 Ves. 308; *Mitchell v. Dors*, 6 Ves. 147; *Smith v. Collyer*, 2 Ves. 90; *Grey v. Duke of Northumberland*, 17 Ves. 281; *Falmouth (Lord) v. Inneys*, *Moseley*, R. 87, 89; *Ante*, 860.

² *Farrand v. Marshall*, 19 Barbour, 380; and on appeal, 21 Id. 409.

³ *Courthope v. Mapplesden*, 10 Ves. 290.

⁴ *Kinder v. Jones*, 17 Ves. 110. See *Shipley v. Ritler*, 7 Md. R. 408.

⁵ *Crockford v. Alexander*, 15 Ves. 138.

ing on the sea, stones of a peculiar value.¹ In short, it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser; or where he exceeds the limited rights with which he is clothed; upon the ground, that the acts are, or may be, an irreparable damage to the particular species of property.²

[* § 929 *a*. It has been held that an owner of lots upon a street, upon which a railway is about to be constructed, which will cause special damage beyond what the company have acquired the right to do, under their charter, may maintain a suit to enjoin such construction.³ But the mere fact that property adjoining a street will be damaged by the grade of the street, gives the owner no cause of action.⁴

§ 929 *b*. Injunctions to prevent obstruction to ancient lights by the erection of buildings are common.⁵ And in such cases the court may allow the building to proceed to a certain height, upon imposing such conditions upon the parties as they may deem reasonable; but it must of course be subject to the final order of the court. And if the party complaining of the injury fail to institute proceedings to restrain the other party, until the building is completed, the court will not interfere, but leave the party to his remedy at law.⁶ And it was held in the very recent case of *Darrell v. Pritchard*,⁷ that in cases of this character, the mere fact that the

¹ *Earl Cowper v. Baker*, 17 Ves. 128.

² *Thomas v. Oakley*, 18 Ves. 184; *Livingston v. Livingston*, 6 Johns. Ch. R. 497; *Field v. Beaumont*, 1 Swanst. 208; *Norway v. Rowe*, 19 Ves. 147, 148, 149, 154. [* But the courts of equity have no power to enjoin a mere trespasser. They will not, therefore, enjoin a clergyman who, without any shadow of right, or any pretence of it, should trespass upon a congregation, by entering their pulpit, and promulgating his peculiar doctrines. *Lutheran Church v. Maschop*, 2 Stockton, Ch. R. 57. So also of cutting timber for staves, or boxing it for turpentine, the remedy at law is adequate. *Gause v. Perkins*, 3 Jones, Eq. R. 177; *Thomas v. James*, 32 Alabama, 723; *Blake v. Brooklyn*, 26 Barb. R. 301; *Bolster v. Catterlin*, 10 Ind. R. 117. Except to stay waste, or prevent some irreparable mischief, an injunction is only issued as ancillary to some primary equity. *Scofield v. Van Bokkelen*, 5 Jones, Eq. R. 342; *Id.* 309; *Id.* 395.

³ *Milhau v. Sharp*, 28 Barb. R. 228.

⁴ *Hatch v. Vermont C. Railw.* 25 Vt. R. 49; *Markham v. Mayor, &c.* 23 Ga. R. 402.

⁵ *Wilson v. Townend*, 1 Drew. & Sm. 324; S. C. 6 Jur. N. S. 1109.

⁶ *Cooper v. Hubbuck*, 7 Jur. N. S. 457.

⁷ 12 Jur. N. S. 16.

damage created by obstruction of light is completed before bill filed, is not of itself a sufficient ground for refusing a mandatory injunction. In this as in other cases of injury to easements, the court looks to the particular circumstances of each case; but it will interfere by way of mandatory injunction only in cases where extreme or very serious damage will ensue from non-interference. And in a very late case in the same court,¹ it is said that, in order to entitle the plaintiff to relief by injunction for obstruction of light and air, the injury complained of must be substantial, or the bill will be dismissed without prejudice to an action at law.

§ 929 c. The owner of an ancient window has an indefeasible right to the enjoyment of the light, without reference to the purpose for which the light has been before used, and it is not sufficient for the defendant to show that the plaintiff would, after the erection of the new buildings, still have sufficient light for his present business; but he must show that for all purposes there will be no material diminution of the light by the proposed erections.²

§ 929 d. It seems questionable how far one can prescribe for the right to continue a nuisance, like discharging sewage into a stream; but if that can be done, there must be clear proof of the continuous exercise of the right for twenty years. The court will interpose by injunction to stay a nuisance which is serious and permanent, and will have reference not only to its present, but to its prospective, effect upon the comfort of the occupier of the land, as well as its permanent value.³

§ 929 e. The subject of the right of the riparian owners to relief in equity, by way of injunction, against any diversion or corrupting of the water, is extensively and learnedly discussed in the recent case of *Holsman v. The Boiling Spring Bleaching Co.*,⁴ where it is declared that courts of equity maintain a concurrent jurisdiction with courts of law, in all cases of diversion of water or rendering it unfit for use, by mixing impure and unwholesome

¹ *Robson v. Whittingham*, 12 Jur. N. S. 40.

² *Yates v. Jack*, 12 Jur. N. S. 305. See, also, *Martin v. Headdon*, 12 Jur. N. S. 387; *Clarke v. Clark*, 11 Jur. N. S. 914. The subject is very lucidly discussed by Vice-Chancellor Wood in two very recent cases. *Dent v. Auction Mart Co.*, *Pilgrim v. Same*, 12 Jur. N. S. 447.

³ *Goldsmid v. Tunbridge Wells Com.* 12 Jur. N. S. 308; *Holsman v. B. S. B. Co.* 1 McCarter, 335.

⁴ 1 McCarter, 335.]

substances with it, and that it is especially proper for courts of equity to interfere in that class of cases, where the pollution of watercourses operates to destroy health, or to diminish the comfort of a dwelling, the action at law affording no adequate redress, and an injunction being indispensable for that purpose.]

§ 930. It is upon similar principles, to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, that courts of equity interfere in cases of patents for inventions, and in cases of copyrights, to secure the rights of the inventor, or author, and his assignees and representatives.¹ It is not to our present purpose to enter upon the subject of the general rights of inventors and authors, or to state the circumstances under which an exclusive property, in virtue of those rights, may be acquired or lost. Our observations must be limited to the consideration of the cases in which courts of equity will interfere to protect those rights, when acquired, by granting injunctions.

§ 931. It is quite plain, that, if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.²

§ 932. Indeed, in cases of this nature, it is almost impossible to know the extent of the injury done to the party, without a discovery from the party guilty of the infringement of the patent or copyright; and if it were otherwise, mere damages would give no adequate relief. For example, in the case of a copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book, which he might otherwise have sold; but it may also be injuring him, to an incalculable extent, in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain.³

§ 933. In addition to this consideration the plaintiff could at law have no preventive remedy, which should restrain the future use of his invention, or the future publication of his work, injuri-

¹ Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 327; 1 Fonbl. Eq. B. 1, ch. 1, § 6, note (p); *Sheriff v. Coates*, 1 Russ. & M. 159.

² *Harmer v. Plare*, 14 Ves. 132; *Hogg v. Kirby*, 8 Ves. 223, 224; *Lawrence v. Smith*, Jacob, R. 472; *Sturz v. De la Rue*, 5 Russ. R. 322.

³ *Hogg v. Kirby*, 8 Ves. 223, 224, 225; *Wilkins v. Aikin*, 17 Ves. 424; *Lawrence v. Smith*, Jacob R. 472.

ously to his title and interests. And it is this preventive remedy which constitutes the peculiar feature of equity jurisprudence, and enables it to accomplish the great purposes of justice. Besides, in most cases of this sort, the bill usually seeks an account, in one case of the books printed, and, in the other, of the profits which have arisen from the use of the invention, from the persons who have pirated the same. And this account will, in all cases where the right has been already established, or is established under the direction of the court, be decreed as incidental, in addition to the other relief by a perpetual injunction.¹

§ 934. In cases, however, where a patent has been granted for an invention, it is not a matter of course for courts of equity to interpose by way of injunction. If the patent has been but recently granted, and its validity has not been ascertained by a trial at law, the court will not generally act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction; but it will require it to be ascertained by a trial in a court of law, if the defendant denies its validity, or puts the matter in doubt.² But, if the patent has been granted for some length of time; and the patentee has put the invention into public use; and has had an exclusive possession of it under his patent for a period of time, which may fairly create the just presumption of an exclusive right, the court will ordinarily interfere by way of preliminary injunction; but a court may in a plain case grant a perpetual injunction, even without a trial by jury,³ pending the proceedings, reserving of course, unto the ultimate decision of the cause, its own final judgment on the merits.⁴ And an injunction

¹ Mitf. Eq. Pl. by Jeremy, 138; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 313 to 327; Eden on Injunct. ch. 12, p. 261, ch. 13, p. 364; Hogg v. Kirby, 8 Ves. 223, 224, 225; Baily v. Taylor, 1 Tamlyn, R. 295; Cooper, Eq. Pl. 155; Universities of Oxford and Cambridge v. Richardson, 6 Ves. 705, 706; Baily v. Taylor, 1 Russ. & Mylne, 73; Sheriff v. Coates, 1 Russ. & Mylne, 159; Geary v. Norton, 1 De Gex & Smale, R. 9. The copyright laws in England authorize the delivery up of the pirated edition to the proprietor of the copyright. A question has recently arisen whether this right existed at the common law, independent of the statutes. See Mr. Vice-Chancellor Wigram's observations upon this point, in Colburn v. Simms, 2 Hare, R. 543, 553.

² Martin v. Wright, 6 Sim. R. 297; Bramwell v. Halcomb, 3 Mylne & Craig, 737; Spottiswoode v. Clarke, 2 Phillips, Ch. R. 156; Stevens v. Keating, Ib. 333; Caldwell v. Van Vliessen, 9 Eng. Law & Eq. R. 51.

³ Goodyear v. Day, 2 Wallace, Jr. 283.

⁴ Hill v. Thompson, 3 Meriv. R. 622, 628; Eden on Injunct. ch. 12, p. 260 · 1

will be granted not only before, but after the time limited for the expiration of a patent, to restrain the sale of machines, piratically manufactured in violation of the patent, while it was in force.¹

§ 935. Similar principles apply to cases of copyright.² But it does not seem indispensable to relief in either case, that the party should have a strictly legal title. It is sufficient, that, under the patent or copyright, the party has a clear equitable title.³ For-
Madd. Ch. Pr. 113; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 316; Cooper, Eq. Pl. 154, 155, 156; Universities of Oxford, &c. v. Richardson, 6 Ves. 706, 707; Harmer v. Plane, 14 Ves. 130; Caldwell v. Van Vlissingen, 9 Eng. Law & Eq. R. 51. Lord Cottenham, in Bacon v. Jones (4 Mylne & Craig, R. 433, 436), made the following remarks on the mode of granting injunctions in cases of patents: "When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit or at the hearing; and, in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open; the court may at once grant the injunction, *simpliciter*, without more, — a course which, though perfectly competent to the court, is not very likely to be taken, where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice, in such a case, of either granting an injunction, and, at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the mean time keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the court, according to the case made. When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise, in which, even at that stage, the court will be of opinion that the injunction may properly be granted, without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent-right, and of the evidence by which it is established, — these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless, it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties. Again, the court may, at the hearing, do that which is the more ordinary course; it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dismissing the bill."

¹ Crossley v. Derby Gas Light Company, 1 Russ. & Mylne, 166, note.

² Universities of Oxford and Cambridge v. Richardson, 6 Ves. 705, 706; Wilkins v. Aikin, 17 Ves. 424.

³ Mawman v. Tegg, 2 Russ. R. 385; Sweet v. Cater, 11 Sim. 572; Simms v. Marryat, 7 Eng. Law & Eq. R. 330; 17 Queen's Bench, 281.

merly, indeed, courts of equity would not interfere, by way of injunction, to protect copyrights, any more than patent-rights, until the title had been established at law.¹ But the present course is, to exercise jurisdiction in all cases where there is a clear color of title, founded upon a long possession and assertion of right.²

§ 936. There are some peculiar principles, applicable to cases of copyright, which deserve notice in this place, and are not generally applicable to patents for inventions. In the first place, no copyright can exist, consistently with principles of public policy, in any work of a clearly irreligious, immoral, libellous, or obscene description. In the case of an asserted piracy of any such work, if it be a matter of any real doubt, whether it falls within such a predicament or not, courts of equity will not interfere by injunction to prevent or to restrain the piracy; but will leave the party to his remedy at law.³

§ 937. It is true, that an objection has been taken to this course of proceeding, that, by refusing to interfere in such cases to suppress the publication, a court of equity virtually promotes the circulation of offensive and mischievous books. But the objection vanishes, when it is considered that the court does not affect to act as a *censor morum*, or to punish or restrain injuries to society generally. It simply withholds its aid from those who, upon their own showing, have no title to protection, or to assert a property

¹ Baron Eyre, in *Leardet v. Johnson*, 1 Y. & Coll. New R. 527, 532, note, said: "The ordinary relief in the case of a patent is an injunction and account. Where the right is disputed, the court expects that to be ascertained by a trial at law." See *Spottiswoode v. Clarke*, 2 Phillips, Ch. R. 154.

² *Eden on Injunct.* ch. 13, p. 284; *Tonson v. Walker*, 3 Swanst. 679; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 326. [As to bills by *aliens* to enjoin the violation of a copyright, see *Ollendorff v. Black*, 1 Eng. Law & Eq. R. 114; *Cocks v. Purday*, 5 Com. B. R. 860; 6 Id. 69; *Boosey v. Purday*, 4 Exch. R. 145; *Boosey v. Jefferys*, 4 Eng. Law & Eq. R. 479; 30 Id. 1; *Buxton v. James*, 8 Eng. Law & Eq. R. 155; 3 De Gex & Smale, 80.]

³ I am not unaware that Lord Eldon has held the opposite of this doctrine; and that is, that if it does admit of real doubt, whether the work be irreligious, immoral, libellous, or seditious, or not, an injunction ought to be denied, upon the mere ground of the doubt. It has been thought that there is great difficulty in adopting this doctrine, denying the protection of an injunction in matters of property upon mere doubts. *Primâ facie* the copyright confers title; and the onus is on the other side to show clearly that, notwithstanding the copy, there is an intrinsic defect in the title. See *Lawrence v. Smith, Jacob*, R. 472.

in things which the law will not, upon motives of the highest concern, permit to be deemed capable of founding a just title or property.¹

§ 938. The soundness of this general principle can hardly admit of a question. The chief embarrassment and difficulty lie in the application of it to particular cases.² If a court of equity, under color of its general authority, is to enter upon all the moral, theological, metaphysical, and political inquiries, which, in past times, have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions; and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors, growing out of them; it is obvious, that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical, as well as at metaphysical truths. Thus, for example, a judge, who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work antichristian which should profess to deny that point, and would refuse an injunction to protect it. So, a judge, who should be a Trinitarian, might most conscientiously decide against granting an injunction in favor of an author enforcing Unitarian views; when another judge, of opposite opinions, might not hesitate to grant it.³

§ 939. In the next place, in cases of copyright, difficulties often arise, in ascertaining whether there has been an actual infringement thereof,⁴ which are not strictly applicable to cases of patents. It is, for instance, clearly settled not to be any infringement of the copyright of a book, to make *bonâ fide* quotations or extracts from it, or a *bonâ fide* abridgment of it; or to make a *bonâ fide* use of

¹ Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 321, 322; Cooper, Eq. Pl. 157; Walcot v. Walker, 7 Ves. 1; Southey v. Sherwood, 2 Meriv. R. 435; Lawrence v. Smith, Jacob, R. 471; Id. 474, note; 6 Petersd. Abridg. Copyright, p. 557, 560.

² Eden on Injunct. ch. 14, p. 315 to 318.

³ See Lawrence v. Smith, Jacob, R. 471.

⁴ [It is an infringement, for the proprietor of an encyclopædia, to publish, in another form, an article written expressly for publication in such encyclopædia. Hereford v. Griffin, 16 Simons, 190.]

the same common materials in the composition of another work.¹ And a work, consisting partly of compilations and selections from former works, and partly of original compositions, may be the subject of copyright.² But what constitutes a *bonâ fide* case of extracts, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials, is often a matter of most embarrassing inquiry.³ The true question, in all cases of this sort, is (it has been said), whether there has been a legitimate use of the copyright publication, in the fair exercise of a mental operation, deserving the character of a new work. If there has been, although it may be prejudicial to the original author, it is not an invasion of his legal rights. If there has not been, then it is treated as a mere colorable curtailment of the original work, and a fraudulent evasion of the copyright.⁴ But this is another mode of stating the difficulty, rather than a test affording a clear criterion to discriminate between the cases.⁵ [Pirating the wood engravings printed in a book as illustrations of the stories therein, and using them in a book as illustrations of different stories, is an infringement of a copyright, which may be restrained by injunction.⁶ It has been held that a prose translation of a copyright prose romance, having no qualities of a paraphrase, is not an infringement of the author's copyright of the original, although the author had procured the work to be translated into the same language as the alleged infringement, and in that language also copyrighted.⁷ A person writing words to an old air, and procuring an accompaniment and preface, and publishing the whole together, is entitled to a copyright in the whole.⁸]

§ 940. A difficulty of a similar character often arises, in the

¹ Edén on Injunct. ch. 13, p. 280, 281; *Campbell v. Scott*, 11 Simons, R. 31.

² *Lewis v. Fullarton*, 2 Beavan, R. 6.

³ [The subject of abridgment is fully discussed in *Story v. Holcombe*, 4 McLean, 307, an alleged infringement of this identical work.]

⁴ *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 1, p. 323, 324; *Edén on Injunct.* ch. 13, p. 380; *Wilkins v. Aikin*, 17 Ves. 425, 426.

⁵ See *Campbell v. Scott*, 11 Simons, R. 31; *Bramwell v. Halcomb*, 3 Mylne & Craig, 737; *Lewis v. Fullarton*, 2 Beavan, R. 6. In the late case of *Folsom v. Marsh*, 2 Story, R. 100, it was held that an abridgment, consisting of extracts of the essential or most valuable portions of the original work, was a piracy.

⁶ *Bogue v. Houlston*, 10 Eng. Law & Eq. R. 215; 5 De Gex & Smale, 267.

⁷ *Stowe v. Thomas*, 2 Wallace, Jr. 547. But see *Murray v. Bogue*, *Drewry*, R. 353.

⁸ *Leader v. Purday*, 18 Law J. Rep. (N. S.) C. P. 97.

ascertainment of the fact whether a work is original or not. Of some intellectual productions, the originality admits of as little doubt as the originality of some inventions or discoveries. But, in a great variety of cases, the differences between the known and the unknown, between the new and the old, between the original and the copy, depend upon shades of distinction extremely minute and almost inappreciable.¹ It is obvious that there can be no monopoly of thoughts, or of the expression of them. Language is common to all; and, in the present advanced state of literature, and learning, and science, most species of literary works must contain much which is old and well known, mixed up with something which perhaps is new, peculiar, and original. The character of some works of this sort may, beyond question, be in the highest sense original; such, for example, as the works of Shakespeare, and Milton, and Pope, and Sir Walter Scott; although all of them have freely used the thoughts of others. Of others, again, the original ingredients may be so small and scattered, that the substance of the volumes may be said to embrace little more than the labor of sedulous transcription, and colorable curtailment of other works. There are others of an intermediate class, where the intermixture of original and borrowed materials may be seen in proportions more nearly approaching to an equality with each other. And there are others, again, as in cases of maps, charts, translations, and road-books, where, the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here is to distinguish what belongs to the exclusive labors of a single mind, from what are the common sources of the materials of the knowledge, used by all.² Suppose, for instance, the case of maps; one man may publish the map of a country; another man, with the same design, if he has equal skill and opportunity, may by his own labor produce almost a *fac-simile*. He has certainly a right so to do. But then, from his right through that medium, it does not follow that he would be at liberty to copy the other map, and claim it as his own. He may work on the same original materials; but he cannot exclusively and evasively use those already

¹ See *Jollie v. Jaques*, 1 Blatchf. 618, an alleged infringement of a musical composition.

² Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 322, 323.

collected and embodied by the skill, industry, and expenditures of another.¹

¹ *Ibid.* ; *Wilkins v. Aikin*, 17 Ves. 424, 425 ; *Longman v. Winchester*, 16 Ves. 269, 271 ; *Matthewson v. Stockdale*, 12 Ves. 270 ; *Carey v. Faden*, 5 Ves. 24 ; *Eden on Injunct.* ch. 13, p. 282, 283. The case of *Campbell v. Scott*, 11 Simons, R. 31, was for an alleged piracy in taking large selections from the work of the poet Campbell. On that occasion the Vice-Chancellor said : " In this case the legal right is, *primâ facie*, quite clear with the plaintiff ; because it is not denied that the extracts complained of are taken literally as they stand from the plaintiff's work. Then is the work complained of anything like an abridgment of the plaintiff's work, or a critique upon it ? Some of the poems are given entire ; and large extracts are given from other poems ; and I cannot think that it can be considered as a book of criticism, when you observe the way in which it is composed. It contains 690 pages, 34 of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century ; then, without any particular observation being appended to the particular poems and extracts from poems which follow, there are 758 pages of selections from the works of other authors ; and, therefore, I cannot think that the work complained of can, in any sense, be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them, and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of pirated matter, which, in fact, constitutes the value of the volume. Then it is said that there is no *animus furandi* ; but if A takes the property of B, the *animus furandi* is inferred from the act. Here there is a very distinct taking, and, in my opinion, it has been done in a manner which the law will not permit. *Roworth v. Wilkes* was a case in which 75 pages of a treatise, consisting of 118 pages, were taken and inserted in a very voluminous work, *The Encyclopædia Londinensis* ; and, although the matter taken formed but a very small proportion of the work into which it was introduced, the jury found for the plaintiff, who was the author of the treatise. I do not think that it is necessary for me to consider whether the selections in this case are the very cream and essence of all that Mr. Campbell ever wrote ; but it is pretty plain that they would not have been inserted in the defendant's work, unless the party who selected them thought that they were very attractive in themselves. However, it so happens that, in turning over the pages of the defendant's publication, I find an extract from *The Pleasures of Hope*, which is the only part of that poem of which I have a distinct recollection ; and I have reason to suppose that is a very striking passage, because it has remained impressed upon my memory for so many years. Then it is said that, with respect to three of the selected poems, the court ought not to interfere in the present case. I admit that they are not contained in Moxon's edition of the plaintiff's works, published in 1840 ; but, nevertheless, there is a general statement, in the bill, that the plaintiff composed them all. And I observe, that Mr. Campbell is the sole plaintiff ; the bill is not filed by him and Mr. Moxon alone, but by Mr. Campbell solely ; and I consider that his copyright in those three poems is entitled to protection equally with his copyright in the rest of the matters, which unquestionably have

§ 941. In some cases of this nature a court of equity will take upon itself the task of inspection and comparison of books alleged

been pirated from Moxon's edition and copied into the work complained of. Then the only question is, whether there has been such a *damnum* as will justify the party in applying to the court; because *injuria* there clearly has been. What has been done is against the right of the plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and, if the court does clearly see that there has been anything done which tends to an injury, I cannot but think that the safest rule is, to follow the legal right and grant the injunction." In *Bramwell v. Halcomb*, Lord Cottenham said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity. In my view of the law, Lord Eldon, in *Wilkins v. Aikin*, 17 Ves. 422, put the question on a most proper footing. He says: 'The question upon the whole is, whether this is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work.' " See also *Gray v. Russell*, 1 Story, Rep. 11.

This subject was largely discussed in *Gray v. Russell*, 1 Story, R. 11. It was the case of a supposed piracy of Gould's edition of Adam's Latin Grammar, with notes. On this occasion, the court said: "Now, certainly the preparation and collection of these notes, from these various sources, must have been a work of no small labor and intellectual exertion. The plan, the arrangement, and the combination of these notes, in the form in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is, then, justly to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly. If no work could be considered by our law as entitled to the privilege of copyright, which is composed of materials drawn from many different sources, but for the first time brought together in the same plan and arrangement, and combination, simply because those materials might be found scattered up and down in a great variety of volumes, perhaps in hundreds, or even thousands of volumes, and might, therefore, have been brought together in the same way, and by the same researches of another mind, equally skilful and equally diligent,—then, indeed, it would be difficult to say that there could be any copyright in most of the scientific and professional treatises of the present day. What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations intermixed with them? What would become of the modern treatises upon astronomy, mathematics, natural philosophy, and chemistry? What would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing. Blackstone's Commentaries is but a compilation of the laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed that it was not a work, which, in the highest sense, might be deemed an original work; since never before were the same materials so admirably combined, and exquisitely

to be a piracy.¹ But the usual practice is, to refer the subject to a master, who then reports, whether the books differ, and in what wrought out, with a judgment, skill, and taste absolutely unrivalled. Take the case of the work on Insurance, written by one of the learned counsel in this cause, and to which the whole profession are so much indebted; it is but a compilation, with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases, or from former authors; but combined together in a new form, and in a new plan and arrangement; yet, I presume, none of us ever doubted that he was fully entitled to a copyright in the work, as being truly, in a just sense, his own. There is no foundation in law for the argument, that, because the same sources of information are open to all persons, and, by the exercise of their own industry, and talents, and skill, they could, from all these sources, have produced a similar work, one party may, at second hand, without any exercise of industry, talents, or skill, borrow from another all the materials which have been accumulated and combined together by him. Take the case of a map of a county, or of a state, or an empire; it is plain, that, in proportion to the accuracy of every such map, must be its similarity to, or even its identity with, every other. Now, suppose a person has bestowed his time, and skill, and attention, and made a large series of topographical surveys, in order to perfect such a map, and has thereby produced one, far excelling every existing map of the same sort. It is clear, that, notwithstanding this production, he cannot supersede the right of any other person to use the same means, by similar surveys and labors, to accomplish the same end. But it is just as clear that he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill, and expenditures. See *Wilkins v. Aikin*, 17 Ves. 424, 425; *Eden on Injunct.* ch. 13, p. 282, 283; 2 *Story on Eq. Jurisp.* § 939 to 942. It would be a downright piracy. Neither is it of any consequence in what form the works of another author are used; whether it be by a simple reprint, or by incorporating the whole, or a large portion thereof, in some larger work. Thus, for example, if, in one of the large encyclopædias of the present day, the whole, or a large portion, of a scientific treatise of another author—as, for example, one of Dr. Lardner's, or Sir John Herschel's, or Mrs. Somerville's treatises—should be incorporated, it would be just as much a piracy upon the copyright, as if it were published in a single volume. In some cases, indeed, it may be a very nice question what amounts to a piracy of a work or not. Thus, if large extracts are made therefrom in a review, it might be a question whether those extracts were designed *bonâ fide* for the mere purpose of criticism, or were designed to supersede the original work, under the pretence of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question, in such a case, must be compounded of various considerations: whether it be a *bonâ fide* abridgment, or only an evasion, by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort, which may

¹ *Lewis v. Fullarton*, 2 Beavan, R. 6.

respects; and, upon such a report, the court usually acts in making its interlocutory, as well as its final decree.¹

enter as elements in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright, yet this proposition must be received with many qualifications. See 2 Story on Equity Jurisprudence, § 939 to 942; Sweet v. Shaw, before the Vice-Chancellor in 1839. The [English] Jurist, for 1839, p. 212. In many cases, the question may naturally turn upon the point, not so much of the quantity as of the value of the selected materials. As was significantly said, on another occasion,—Non numerantur, ponderantur. The quintessence of a work may be piratically extracted, so as to leave a mere *caput mortuum*, by the selection of all the important passages in a comparatively moderate space. In the recent case of Bramwell v. Halcomb (3 Mylne & Craig, 737), it was held that the question whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work, which he has quoted, or introduced into his own book. On that occasion Lord Cottenham said: 'When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, which is looked to. It is useless to look to any particular cases about quantity.' See the Lord Chancellor's opinion in Bell v. Whitehead, The [English] Jurist, 1839, p. 14; Sweet v. Shaw, before the Vice-Chancellor, 1839; The [English] Jurist, for 1839, p. 212. The same subject was a good deal considered by the same learned judge, in Saunders v. Smith (3 Mylne & Craig, R. 711, 728, 729), with reference to copyright in reports; and how far another person was at liberty to extract the substance of such reports, or to publish select cases therefrom, even with notes appended. In the case of Wheaton v. Peters (8 Peters, R. 591), the same subject was considered very much at large. It was not doubted by the court that Mr. Peters's Condensed Reports would have been an infringement of Mr. Wheaton's copyright (supposing that copyright properly secured under the act), if the opinions of the court, had been, or could be, the proper subject of the private copyright by Mr. Wheaton. But it was held that the opinions of the court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the court, that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the Circuit Court for the purpose of further inquiries as to the fact whether the requisites of the act of Congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright (for that was all the work which could be the subject of copyright); so that, if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress." See also Emerson v. Davies, 3 Story, R. 768.

¹ Eden on Injunct. ch. 13, p. 289; Carnan v. Bowles, 2 Bro. Ch. R. 80; — v. Leadbetter, 4 Ves. 681; Carey v. Faden, 5 Ves. 24, 25; Jeffrey v. Bowles, 1 Dick. 429.

[* § 941 a. The question of what amounts to piracy of the copyright of a book is very extensively discussed, by a very understanding and clear-sighted judge, in a recent case,¹ and the following propositions established. It would be a legitimate use of another's book, protected by copyright, after getting one's own work, by original and independent labor, into a shape approximating what he considered perfect, to look through the earlier work to see if it contained any heads which he had forgotten. But if one, instead of searching into the common sources, and obtaining his materials from them, should avail himself of the labor of his predecessor, and adopt his arrangement, or do it with only a colorable variation, or his materials, it would be an infringement of the copyright. And falsely to deny that one has taken any idea, or language, from the former work, when it is apparent that large portions of it have been abstracted from it, is strong indication of the *animus furandi*. And where that is shown to have existed, it raises a violent presumption that it has prompted its possessor to an improper infringement of the rights of his predecessor. And, in most cases, it will be proper and safe to grant an injunction where that intent is clearly shown. It was decided very recently, by the Court of Common Pleas, that dramatizing the incidents of a novel, which had been published, was no infringement of the copyright.² The copyright only secures the exclusive right of "printing or otherwise multiplying copies," according to the English statute. It was attempted, in this case, to establish a common-law right of property in the author of a literary work, independently of the statute, and existing concurrently with it, but the court give no countenance to the argument.

§ 941 b. Questions sometimes arise in regard to the equitable interest of publishers in copyrights, by virtue of contracts with the authors, for successive editions. In a late case, before the Lords Justices, on appeal, it was held, that where publishers agreed with an author to print, reprint, and publish a work at their own risk, upon certain specified terms, and that, if other editions should be required, the author should make the necessary alterations and additions, and the publishers should publish all subsequent edi-

¹ [* *Jarrold v. Houlston*, 3 Kay & Johnson, 708. See *Crookes v. Petter*, 6 Jur. N. S. 1131.

² *Reade v. Conquest*, 7 Jur. N. S. 265. The same point had been before ruled. *Coleman v. Wathen*, 5 T. R. 245.

tions upon the same terms; and after several changes in the partners of the house and the bankruptcy of the last survivor of the original contractors, the assignees, with the solvent partners of the new firm, to whom the work had been assigned by their predecessors, assigned, to other law-publishers, all the interest of the firm in the work and all the unsold copies; it was held that the purchasers had no share in the copyright of the work, and were not entitled to an injunction to restrain the publication of a new edition by another publisher, with the author's concurrence, the agreement being held to be of a personal nature, on both sides, and the benefit of it not assignable, except by mutual consent of the parties.¹]

§ 942. In cases of the invasion of a copyright by using the same materials in another work, of which a large proportion is original, it constitutes no objection that an injunction will in effect stop the sale and circulation of the work, which so infringes upon the copyright. If the parts which are original cannot be separated from those which are not original, without destroying the use and value of the original matter, he who has made the improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to another, and the mixture is forbidden by the law, he must again separate them, and bear all the mischief and loss which the separation may occasion. The same rule applies to the use of literary matter.² It proceeds upon the same general principle of justice, which applies to the ordinary case of a confusion of property by premeditation or wanton impropriety.³

§ 943. In pursuing the subject of injunctions to prevent irreparable mischief and multiplicity of suits,⁴ we come to a class of cases where courts of equity interfere to restrain the publication of unpublished manuscripts. In cases of literary, scientific, and professional treatises in manuscript, it is obvious that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he

¹ *Stevens v. Benning*, 6 De G. M. & G. 223. See, also, *Reade v. Bentley*, 3 Kay & Johnson, 278; S. C. 4 Kay & J. 656.]

² *Mawman v. Tegg*, 2 Russ. R. 390, 391. But see *Baily v. Taylor*, 1 Tamlyn, R. 295; *Emerson v. Davies*, 3 Story, R. 768. [* See also *Jarrold v. Houlston*, where this point is very extensively and thoroughly discussed. 3 Kay & J. 708.]

³ Story, Comm. on Bailments, § 40; *Ante*, § 468, 623.

⁴ *Ante*, § 851 to 855, 857.

justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them. The property, then, in such manuscripts not having been parted with in cases of this sort, if any attempt is made to publish them without the consent of the author or proprietor, it is obvious that he ought to be entitled to protection in equity.¹ And, accordingly, this course of granting injunctions against such unauthorized publications has been constantly acted upon in courts of equity;² and has been applied to all sorts of literary compositions.³

§ 944. Upon the same principle, the publication of private letters forming literary compositions has been restrained, where the publication has been attempted without the consent of the author.⁴ Upon one occasion of this sort, the question arose, whether letters, having the character of literary compositions, remained in any respect the property of the writer, after they were transmitted to the person to whom they were addressed. It was held that they did; that by sending letters the writer does not part wholly with his property in the literary compositions nor give the receiver the power of publishing them, and that at most the receiver has only a special property in them, and possibly may have the property of the paper. But this does not give a license to any person whatsoever to publish them to the world; and at most, the receiver has only a joint property with the writer. Whether he is to be con-

¹ See *Prince Albert v. Strange*, 1 Mac. & Gord. 25; 1 Hall & Twells, 1.

² *Eden on Injunct.* ch. 13, p. 275, 276; *Duke of Queensbury v. Shebbeare*, 2 Eden, R. 329; *Southey v. Sherwood*, 2 Meriv. R. 434, 436; *Macklin v. Richardson*, Ambl. R. 694; *Pope v. Curl*, 2 Atk. 343.

³ An author of letters or papers of whatever kind, whether they be letters of business, or private letters, or literary compositions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character. *Folsom v. Marsh*, 2 Story, R. 100. See the qualification as to the right of the government to publish official letters, *post*, § 947, note.

⁴ *Pope v. Curl*, 2 Atk. 342; 3 Wooddes. Lect. 56, p. 415. [See an able article on this subject in the *American Law Register*, June, 1853, Vol. 1, No. 8, p. 449.]

sidered as having such joint property or not, letters having the character of literary composition must be treated as within the laws protecting the rights of literary property; and a violation of those rights in that instance is attended with the same legal consequences as in the case of an unpublished manuscript of an original composition of any other description.¹

§ 945. In a comparatively recent case, Lord Eldon has explained the doctrine of courts of equity on this subject to be founded, not on any notion that the publication of letters would be painful to the feelings of the writer, but upon a civil right of property, which the court is bound to respect. That the property is qualified in some respects; that, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed; yet, that the gift is so restrained, that, beyond the purposes for which the letter is sent, the property is in the sender. Under such circumstances, it is immaterial whether the intended publication is for the purpose of profit or not. If for profit, the party is then selling; if not for profit, he is then giving that, a portion of which belongs to the writer.²

§ 946. A question has been made, and a doubt has been suggested, how far the like protection ought to be given, to restrain the publication of mere private letters on business or on family-concerns, or on matters of personal friendship, and not strictly falling within the line of literary compositions.³ In a moral view the publication of such letters, unless in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined. It strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments between relatives, and friends, and correspondents, which is so essential to the well-being of society and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress from the public display of

¹ *Pope v. Curl*, 2 Atk. 342; *Lord Perceval v. Phipps*, 2 Ves. & Beam. 19, 24; *Thompson v. Stanhope*, Ambler, R. 739, 740; *Gee v. Pritchard*, 2 Swanst. R. 403, 414, 415, 422, 425.

² *Gee v. Pritchard*, 2 Swanst. R. 413 to 416.

³ *Perceval v. Phipps*, 2 Ves. & Beam. 24 to 28. See 1 Am. Law Reg. 449.

facts and circumstances which were reposed in the bosoms of others under the deepest and most affecting confidence that they should forever remain inviolable secrets. It may do more, and compel every one, in self-defence, to write, even to his dearest friends, with the cold and formal severity with which he would write to his wariest opponents or his most implacable enemies. Cicero has with great beauty and force spoken of the grossness of such offences against common decency. *Quis enim unquam, qui paulum modo bonorum consuetudinem nosset, literas, ad se ab amico missas, offensione aliquâ interposita, in medium protulit, palamque recitavit? Quid est aliud, tollere e vitâ vitæ societatem quam tollere amicorum colloquia absentium? Quam multa joca solent esse in epistolis, quæ, prolati si sint, inepta, videantur! Quam multa seria, neque tamen ullo modo divulganda!*¹

§ 947. It would be a sad reproach to English and American jurisprudence if courts of equity could not interpose in such cases; and if the rights of property of the writers should be deemed to exist only when the letters were literary compositions. If the mere sending of letters to third persons is not to be deemed, in cases of literary composition, a total abandonment of the right of property therein by the sender; *à fortiori*, the act of sending them cannot be presumed to be an abandonment thereof in cases where the very nature of the letters imports, as matter of business, or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy.²

¹ Cic. Orat. Phillip 2, ch. 4, Oliv. & Ernest, edit.; cited by Sir Samuel Romilly, 2 Swanst. 419.

² In *Folsom v. Marsh*, 2 Story, R. 100, 113, Mr. Justice Story said: "In respect to official letters addressed to the government or any of its departments by public officers, so far as the right of the government extends, from principles of public policy to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service or the character of the documents, embracing historical, military, or diplomatic information, it may be the right and even the duty of the government to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents, to use them and publish them upon fit and justifiable occasions. But assuming the right of the government to publish

§ 948. Fortunately for public as well as for private peace and morals, the learned doubts on this subject have been overruled; and it is now held, that there is no distinction between private letters of one nature and private letters of another.¹ For the purposes of public justice, publicly administered, according to the established institutions of the country, in the ordinary modes of proceeding, private letters may be required to be produced and published.² But it by no means follows, that private persons have a right to make such publications on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of indulging a gross and diseased public curiosity, by the circulation of private anecdotes, or family secrets, or personal concerns.³

§ 948 *a.* But the utmost extent to which courts of equity have gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property in the book or letters sought to be published. They have never assumed, at least since the destruction of the Court of Star Chamber, to restrain any publication which purports to be a literary work, upon the mere ground that it is of a libellous character,⁴ and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication.⁵ For matters

such official letters and papers, under its own sanction and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own private profit and advantage. Recently the Duke of Wellington's despatches have (I believe) been published by an able editor with the consent of the noble duke, under the sanction of the government. It would be a strange thing to say, that a compilation involving so much expense and so much labor to the editor, in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor." [In 1 Am. Law Reg. p. 459, it is said this case may probably be sustained on another ground, viz. that Mr. Sparks had a copyright in his work, and that another person could not copy from that, even if he might publish the original letters.]

¹ [This position seems questioned by an able writer in the American Law Register, June, 1853.]

² *Gee v. Pritchard*, 2 Swanst. R. 418, 426, 427; *Brandreth v. Lance*, 8 Paige, R. 24.

³ *Ibid.*

⁴ See acc. *Clark v. Freeman*, 11 Beav. 112.

⁵ See *Hoyt v. Mackenzie*, 3 Barb. Ch. R. 320; *Wetmore v. Scovill*, 3 Edwards, Ch. R. 529.

of this sort do not properly fall within the jurisdiction of courts of equity to redress, but are cognizable, in a civil or criminal suit, at law. To justify, therefore, the interposition of a court of equity, by way of injunction, in cases of literary publication, there must be an invasion by the defendant of the rights of property of the plaintiff, or some direct breach of confidence connected therewith.

§ 949. Principles of a similar nature have been applied for the assistance of persons, to whom letters are written, and by whom they are received, in order to protect such letters from publication in any manner injurious to the rights of property of the lawful owners thereof.¹ So they have been applied in all cases where the publication would be a violation of a trust or confidence, founded in contract,² or implied from circumstances. Thus, for example, where a person delivers scientific or literary oral lectures, it is not competent for any person who is privileged to hear them, to publish the substance of them from his own notes;³ for the admission

¹ Earl of Granard *v.* Dunkin, 1 B. & Beatt. 207; Thompson *v.* Stanhope, Ambler, R. 737.

² See Lord Perceval *v.* Phipps, 2 Ves. & Beam. 19, 27; Eden on Injunct. ch. 13, p. 279.

³ [The only case upon this point which has fallen within the observation of the editor is that of *Abernethy v. Hutchinson*, 3 Law Journal Reports, Chanc. 209, before Lord Chancellor Eldon, in 1825, which was a bill by the celebrated surgeon Abernethy for an account of the profits derived by the defendants from the sale of surgical lectures delivered by the plaintiff, and to restrain him from publishing or republishing the same. The plaintiff was surgeon of St. Bartholomew's Hospital, and, as such, delivered oral lectures (from notes or heads in writing previously prepared by him) to his pupils and students, who paid regular fees for the privilege of attending the same. The defendant was the publisher of *The Lancet*, and published the lectures *verbatim* as they were delivered. The principal grounds of defence were: *First*, That the lectures were not *written*, and therefore the plaintiff had no right of property in them. *Secondly*, The delivery of the lectures was not voluntary, but a part of the official duty of the plaintiff as surgeon of the hospital. *Thirdly*, That the defendant was a publisher, and there was nothing to connect him with the pupils, or with any of the restrictions impliedly imposed upon the pupils against reporting the lectures. The Lord Chancellor declined to say whether the plaintiff had any property in a lecture purely oral, that being a question purely of law, and the point never having been decided; that when the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected, because the court must be satisfied that the publication complained of was an invasion of the written work, and this could only be done by comparing the composition with the piracy. But it did not follow that, because

to hear such lectures is upon the implied confidence and contract, that the hearer will not use any means to injure or to take away the exclusive right of the lecturer in his own lectures.¹ [* And one may be restrained by injunction from publishing the contents of documents, the knowledge of which he obtains from the production of the documents, as exhibits, or under the order of the court.²]

§ 950. So, where a dramatic performance has been allowed by the author to be acted at a theatre, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theatre without the consent of the author or proprietor; for his permission to act it at a public theatre does not amount to an abandonment of his title to it, or a dedication of it to the public at large.³

§ 951. So an injunction will be granted against publishing a magazine in a party's name who has ceased to authorize it;⁴ [so, to restrain the directors of a joint-stock company from publishing a prospectus, which, without authority, stated A. to be a trustee of the company;⁵] or, from assuming the name of a newspaper, published by the plaintiff, for the fraudulent purpose of deceiving the public, and supplanting the plaintiff in the good-will of his own newspaper.⁶ So, an injunction will be granted against vending an article of trade under the name of a party, with false labels, to the injury of the same party, who has already acquired a reputation in trade by it.⁷ [But it has been refused, when sought against a chemist for selling a quack medicine under a false and

the lecture was not in writing, it was therefore within the power of the person who heard it to publish it. On the contrary, he was clearly of the opinion that the lecture could not be published for profit; that, although those pupils who were rightfully admitted to the lectures might take them down for their own information, they could not publish them for profit or sell them to others to publish. The second point was also overruled by the Lord Chancellor.]

¹ See also *Bartlette v. Crittenden*, 4 McLean, C. C. R. 300.

² [* *Williams v. Prince of Wales Life Ins. Co.* 23 Beavan, 338.]

³ See *Morris v. Kelley*, 1 Jac. & Walk. 481.

⁴ *Hogg v. Kirby*, 8 Ves. 215; *Eden on Injunct.* ch. 14, p. 313, 314; *Bell v. Locke*, 8 Paige, R. 75.

⁵ *Routh v. Webster*, 10 Beavan, 561.

⁶ *Bell v. Locke*, 8 Paige, R. 75.

⁷ *Eden on Injunct.* ch. 14, p. 314, 315; *Motley v. Downman*, 3 Mylne & Craig, 1, 14, 15; *Millington v. Fox*, 3 Mylne & Craig, 338; *Perry v. Truefitt*, 6 Beavan, R. 66; *Franks v. Weaver*, 10 Beavan, 297.

colorable representation that it was the medicine of the plaintiff, an eminent physician, who had not any such medicine of his own, with which the quack medicine could come in competition.¹] So, an injunction will be granted to restrain the owner from running omnibuses, having on them such names, and words, and devices, as to form a colorable imitation of the words, names, and devices on the omnibuses of the plaintiff; for this has a natural tendency to deprive the plaintiff of the fair profits of his business, by attracting custom under the false representation, that the omnibuses of the defendant belong to, and are under the management of the plaintiff.² So, an injunction will be granted to prevent the use of names, marks, letters, or other *indicia* of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman, when they are not so.³

[* § 951 a. So, after one has rendered a song popular by it being sung by a particular performer at a popular theatre, or concert, and has published it, with a title-page containing a picture of the singer, and a statement where and by whom the song had been accustomed to be sung, which had given it an extensive sale ;

¹ Clark v. Freeman, 12 Jurist, 149 ; 10 Beav. 112.

² Knott v. Morgan, 2 Keen, R. 218, 219 ; Perry v. Truefitt, 6 Beavan, R. 66.

³ Perry v. Truefitt, 6 Beavan, R. 66 ; Gout v. Aleploglu, 6 Beavan, R. 69, note.

[This principle has been applied to the keeper of a hotel who adopted, as the name for his house, the name of another hotel of high reputation. Howard v. Henriques, 3 Sandf. S. C. 725.] In Perry v. Truefitt, Lord Langdale said : " I think that the principle on which both the courts of law and equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man ; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark ; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark. The case of Millington v. Fox (3 M. & Cr. 338) seems to have gone this length, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. I am not aware that any previous case carried the principle to that extent. [* But see Ainsworth v. Walmsley, 12 Jur. N. S. 205.

and another publisher put forth the same melody, with different words, but in a form so similar as to give it the appearance of being the same, and stated that it had been sung by the same performer at the same place named in plaintiff's publication, which was false; it was held that this was a palpable attempt to induce the public to believe that the song, so published was the same as that of the first publishers; and the publication was accordingly restrained by interlocutory injunction.¹ And the defendant cannot escape responsibility by cautioning his shopmen to explain to customers that this song is not the same as the plaintiff's.² In a clear case; the right will not be required to be tried at law previous to granting an injunction³.]

[§ 951 *b*. Some confusion exists among the authorities whether it is essential that the person to be enjoined should have used the marks, letters, &c. for the fraudulent purpose of putting off his goods *as and for* the manufacture of another person, who has an established reputation in the market; or whether, on the other hand, an injunction will be granted, if the defendant merely used marks similar to those before adopted by some earlier manufacturer, but without any design to represent the goods as having been made by him. It has sometimes been held that no fraudulent intent is necessary on the part of the defendant, but that he is liable to an injunction if he uses marks so similar to those already adopted by another as to deceive ordinary purchasers, and lead them to believe they are purchasing the manufacture of a different person; and this although the defendant did not know that his mark had been in prior use by others,⁴ especially if his goods be inferior to those of the former. On the other hand it has been thought that a fraudulent intent is necessary on the part of the defendant to represent his goods to be manufactured by some other person, who has used the same or very similar marks, and thus to deceive the public and injure the person already using the same trade-marks. At least this rule has been applied where two manufacturers of the same name make the same article and call it by the same name, but without any design to pass off the

¹ Chappell *v.* Sheard, 2 Kay & J. 117.

² Chappell *v.* Davidson, 2 Kay & J. 123.

³ Tipping *v.* Eckersley, 2 Kay & J. 264.]

⁴ See Kendall *v.* Davis, 2 R. Island R. 566; Coffeen *v.* Branton, 4 McLean, 516; Millington *v.* Fox, 3 M. & C. 338; Pierce *v.* Franks, 10 London Jurist, 25; Rodgers *v.* Nowell, 6 Hare, 325.

article as made by any one but themselves. Thus, where William Robert Burgess manufactured "Burgess's Essence of Anchovies," which under that name had acquired great celebrity in market, and his son, William Harding Burgess, began to manufacture a fish-sauce which he called "Burgess's Essence of Anchovies," it was held he was not to be enjoined therefor, in the absence of any evidence that he was representing his own article to have been made by the older manufacturer.¹ And in a very early case, the same doctrine seems to have been recognized.² There a card-manufacturer stamped a picture of "The Great Mogul" upon his cards, which a former manufacturer had also used. Lord Hardwicke denied any injunction, as there was no proof that the defendant used the mark to signify that the cards were made by the plaintiff. This was in 1742. In 1783 the same principle was acted upon by Lord Mansfield.³ It is not every mark, letter, or word which is capable of being appropriated even by one who first adopts it to the exclusion of every other who may come after him. The rule sometimes laid down on this subject is, that if a name, sign, mark, brand, label, word, or device of any kind, can be advantageously used to designate the goods, property, or particular place of business, of a person engaged in trade, manufactures, or any similar business, he may adopt and use such as he pleases, which have not before been appropriated; and no other can law-

¹ [*Burgess v. Burgess*, 17 Eng. Law & Eq. R. 257; 3 De Gex, Mac. & Gordon, 896. In this case Turner, Lord Justice, said: "It is clear no man can have any right to represent his goods as the goods of another; but in all these cases it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under his own name, and another person not having the same name is using it, it is clear that he so uses it to represent the goods sold by himself as the goods of another; but when two persons have the same name, it does not follow that because the defendant sells goods under his own name, he is selling them as the goods of the plaintiff." And Knight Bruce, L. C., added: "All the queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less so that their fathers have done so before them. All the queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their father." See, also, *Holloway v. Holloway*, 13 Beavan, 209; *Edleston v. Vick*, 23 Eng. Law & Eq. 57.]

² *Blanchard v. Hill*, 2 Atk. 484.

³ *Singleton v. Bolton*, 3 Dougl. 293. See, also, *Canham v. Jones*, 2 Vesey & Beames, 218 (1813); *Bell v. Locke*, 8 Paige, Ch. R. 75 (1840); *Snowden v. Noah*, Hopk. Ch. R. 347 (1825); *Croft v. Day*, 7 Beavan, 84; *Spottiswood v. Clark*, 10 London Jurist, 1043.

fully imitate them, and by that means sell his own goods or property, or carry on his business, as the goods, property, or business of the former. But in respect to words, marks, or devices which do not indicate the goods, property, or particular place of business of a person, but only the nature, kind, or quality of the articles in which a person deals, no property can be acquired therein.¹ Thus, where a company marked their best goods, "Amoskeag Manufacturing Co. Power Loom. Yds. —, A. C. A.," and which were generally known in market as "A. C. A. tickings," an injunction was refused against another company who marked their goods with a label in form, color, border, and general appearance like the former, but with the words, "Lowell Premium Tickings. Power Loom. Yds. —, A. C. A." and sold them as real A. C. A. tickings; the court saying that one company had as good right as another to use the letters of the alphabet.² In applications for injunctions for using trade-marks, the plaintiff must come into court however with clean hands; if he has himself been using false marks, tending to deceive the public, as calling an article patent when it is not, and the like, he is not favorably received in a court of equity.³

[* § 951 c. In a late case,⁴ the subject of trade-marks is elaborately discussed by the Lord Chancellor. He says the gist of the action is, that the defendant had sold, *as and for* the manufacture of the plaintiff, something that was not his manufacture, and that the supposed spurious mark was put on, in order to make it more apparent that it was so. But where the mark consisted in a label in a certain form, and it was shown that, in very many instances, such labels were made and sold for legitimate purposes, the court,

¹ See *Stokes v. Landgraff*, 17 Barbour, 608; *Gillott v. Kettle*, 3 Duer, 624.

² *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. 600. See, also, *Coats v. Holbrook*, 2 Sandf. Ch. R. 586; *Partridge v. Menck*, Id. 622; 2 Barbour, Ch. R. 105; *Taylor v. Carpenter*, 3 Story, R. 458; 2 Sandf. Ch. R. 603; *Stone v. Caslan*, 12 Boston Law Rep. 360; *Marsh v. Billings*, 7 Cush. 322; *Thomson v. Winchester*, 19 Pick. 214; *Ames v. King*, 2 Gray, 379, where the authorities are collected.

³ See *Flavell v. Harrison*, 19 Eng. Law & Eq. R. 15; *Pidding v. How*, 8 Sim. 477; *Perry v. Truefitt*, 6 Beav. 66. See *Edleston v. Vick*, 23 Eng. Law & Eq. 51.

⁴ [* *Farina v. Silverlock*, 6 De G. M. & G. 214. This case is somewhat qualified and explained in its subsequent stages before the Vice-Chancellor. 4 Kay & J. 650:

in the absence of any proof of actual fraud, refused to restrain the printing and sale of the labels, until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his right by an action at law. So, too, a foreign manufacturer may file his bill in the courts of equity in England, for an injunction and account of profit, against a manufacturer in that country, who has committed a fraud upon him by the use of his trade-mark, for the purpose of inducing the public to believe that the goods so marked were manufactured by such foreigner. This relief is founded upon the personal injury caused the plaintiff by the defendant's fraud, and exists, although the plaintiff resides and carries on his business in another country, and has no establishment in England, and does not sell his goods there. This rule was adopted in two cases, in the Vice-Chancellor's court, respecting the celebrated American axes, manufactured by the Collins Company.¹

951 d. And where one sells his share in a partnership business then in operation, it imports the sale of the good-will of the business. This comprehends every positive advantage which has been acquired by the firm in carrying on its business, whether connected with the place or the name of the firm, but it does not imply a prohibition against the retiring partner carrying on the same business in the same place, so that he do it under such a name as not to give the impression that he is the successor of the old firm. He will be restrained from doing this by injunction.² The good-will of a business, which, in general, imports the tendency of business to a particular house, is held not to be applicable to solicitors.³ Such a contract is not susceptible of specific performance in a court of equity, as was said in the case just referred to.⁴ But the good-will of such a business may fairly be sold for a

¹ The Collins Company v. Brown, 3 Kay & J. 423; Same v. Cowen, Id. 428. The true ground of enjoining the use of a trade-mark is, that its similarity to plaintiff's was intended by defendants to give purchasers to understand the goods were the same, and that it would be likely to produce that effect, with the majority of purchasers. Merrimack Manuf. Co. v. Garner, 4 E. D. Smith, 387; Clark v. Clark, 25 Barb. R. 76; Brooklyn White Lead Co. v. Masury, 25 Barb. R. 416. See, also, Seixo v. Provezende, 12 Jur. N. S. 215; Leather Cloth Company v. American Leather Cloth Company, 11 Jur. N. S. 513.

² Churton v. Douglas, 5 Jur. N. S. 887; S. O. Johnson, 174. But see Bowman v. Floyd, 3 Allen, 76.

³ Austen v. Boys, 2 De Gex & Jones, 626; S. C. 24 Beavan, 598.

⁴ Ibid.

pecuniary consideration. An injunction restraining one from carrying on a business within a fixed distance from a certain spot, imports distance, not by the road, but by a straight line in a horizontal plane.¹ In order to claim relief by way of injunction, it is not requisite to show a fraudulent purpose in the defendant. It is sufficient if the similarity of title have led, and is likely to lead, to mistakes.²

§ 951 *e.* A somewhat remarkable case in regard to the extent of the jurisdiction of the English courts of equity, as to their remedial justice by way of injunction, occurred since the publication of the last preceding edition of these commentaries. The *Emperor of Austria v. Day and Kossuth*,³ where it was held that the plaintiff, although not entitled to an injunction from a court of equity in England to stop any proceedings there, the object and tendency of which might be to abridge or destroy his prerogative rights and interests, as a foreign sovereign, with whom the government was on terms of amity, yet, inasmuch as the defendant Day had manufactured plates for the printing of notes, or public securities, of the kingdom of Hungary, purporting to be issued in the name of the nation, and bearing the signature of the other defendant, as having authority to issue them, and as there was no pretence of such authority, until after a revolution should be effected there; and as the plaintiff was, at the time of bringing and hearing the action confessedly the sovereign of that kingdom, with the lawful right and constitutional obligation to prescribe and protect the currency of that kingdom, he was entitled to an injunction against issuing such notes, on the ground of protecting the plaintiff and his subjects, the inhabitants of Hungary, against the pecuniary and property injury consequent upon the issue and circulation of such notes. And it was further considered that the paper prepared for printing such notes, together with the plate and such of the notes as had been already printed, inasmuch as

¹ *Duignon v. Walker*, 5 Jur. N. S. 976; *Redfield on Railways*, 194, § 106.

² *Clement v. Maddick*, 5 Jur. N. S. 592.

³ 7 Jur. N. S. 483, before Vice-Chancellor Stuart; S. C. Id. 639, before the court of Chancery Appeal. The character of the suit, and the grand scale in which the manufacture was entered upon, "twenty tons of promissory notes," and the character of the counsel, Sir Roundell Palmer, since Attorney-General, and others of almost equal celebrity, together with the learning and research evinced in the argument, combine to render the case one of the most interesting in modern times.]

they could not be used for innocent purposes, like arms and munitions of war, and numerous other articles prepared for illegal use, it was proper for the court to order their destruction, which was accordingly done, by arrangement of parties, under the direction of the judge at chambers. The Court of Appeal directed the paper delivered to the plaintiff, upon payment to the defendant, Day, of the market value of the pulp. The Court of Appeal very distinctly disclaimed all power to interfere in the case for the purpose of preventing revolution, or for any other purpose than the protection of the plaintiff's rights of property, and those of others fairly represented by him in the suit. It is said by the Lord Chancellor in this case, and assumed by the other judges, that the sovereign power of every state has the right of issuing notes for the payment of money, as part of the circulating medium of the country; that this results from the power to coin money, as the necessary prerogative of all sovereign power; that this power is not restricted to the precious metals, as being of intrinsic value, according to their weight and fineness, but under this prerogative it is competent to make the coarser metals a circulating medium, or other substances may be made to represent varying amounts in value of gold and silver for which they pass current.]

§ 952. Upon similar grounds of irreparable mischief, courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests.¹ [Thus, a party has been restrained from using the secret of compounding a medicine not protected by patent, when it appeared that the secret was imparted to him, to his own knowledge, in breach of faith or contract, on the part of the person so communicating it.²]

§ 953. There are other cases where injunctions are granted to prevent a total failure of remedial justice. Courts of equity will interfere by injunction, to prevent the sales of real estates; as to restrain the vendor from selling to the prejudice of the vendee, pending a bill for the specific performance of a contract respecting

¹ *Cholmondeley v. Clinton*, 19 Ves. 261, 267; *Evitt v. Price*, 1 Sim. R. 483; *Yovatt v. Winyard*, 1 Jac. & Walk. 394.

² *Morrison v. Moat*, 15 Jurist, 787; S. C. 6 Eng. Law & Eq. R. 14. And see *Williams v. Williams*, 3 Meriv. 159; *Green v. Folghamb*, 1 Sim. & Stu. 398.

an estate; for it might put the latter to the expense of making the purchaser a party, in order to give perfect security to his title.¹

§ 954. In like manner, sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons; as in cases of trusts, and special authorities, where the party is abusing his trust or authority.² And where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, courts of equity will also restrain the purchaser from paying over the purchase-money.³ [And, generally, where the necessity of the case requires it, a court of equity will interfere to prevent a defendant from affecting property in litigation, by contracts, conveyances, or other acts.⁴]

§ 955. Cases of injunctions against a transfer of stocks, of annuities, of ships, and of negotiable instruments, furnish an appropriate illustration of the same principle;⁵ as also do injunctions, to restrain husbands from transferring property in fraud of the legal or equitable rights of their wives.⁶

§ 955 *a*. The question has been made, how far a court of equity has jurisdiction to interfere in cases of public functionaries, who are exercising special public trusts or functions. As to this, the established doctrine now is, that so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are as-

¹ *Echcliff v. Baldwin*, 16 Ves. 267; *Curtis v. Marquis of Buckingham*, 3 Ves. & B. 168; *Daly v. Kelly*, 4 Dow, R. 440; *Ante*, § 406, 908.

² *Anon.* 6 Madd. R. 10. See *Parrott v. Congreve*, 13 Jur. 398.

³ *Green v. Lowes*, 3 Bro. Ch. R. 217; *Matthews v. Jones*, 2 Anstr. 506; *Hawkshaw v. Parkins*, 2 Swanst. 549; *Hine v. Handy*, 1 Johns. Ch. R. 6.

⁴ *Shrewsbury, &c. R. Co. v. Shrewsbury and B. R. Co.* 4 Eng. Law & Eq. R. 171; *The Great W. R. Co. v. The Birmingham, &c. R. Co.* 12 Jurist, 106; *S. C.* 2 Phillips, 597.

⁵ *Terry v. Harrison*, Bunb. R. 289; *Chedworth v. Edwards*, 8 Ves. 46; *Stead v. Clay*, 1 Sim. 294; *Hood v. Aston*, 1 Russ. R. 412; *Thompson v. Smith*, 1 Madd. R. 395; *Rogers v. Rogers*, 1 Anst. R. 174; *Ante*, § 907.

⁶ *Anon.* 9 Mod. 43; *Eden on Injunctions*, ch. 14, p. 295, 296; *Roberts v. Roberts*, 2 Cox, 422; *Flight v. Cook*, 2 Ves. 619; 1 Eq. Abridg. 360, pl. 5; *Ante*, § 847, and note (1); *Cadogan v. Kennet*, Cowp. R. 436.

suming to themselves a power over property which the law does not give them, this court no longer considers them as acting under authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.¹

§ 956. We have already had occasion to take notice of the granting of injunctions in the cases of persons having future interests in chattels, as in remainder after an immediate estate for life.² [* And the same principle is applied where land is sold with covenant from the grantee, or upon condition, that the erections upon it shall be of a prescribed character. The performance of such stipulations will be enforced in equity by restraining any departure from them.³] The same principle is applied to cases of personal property, bequeathed as heirlooms, or settled in trust to go with particular estates. Thus, for example, household furniture, plate, pictures, statues, books, and libraries are often bequeathed or settled in trust, to go with the title of certain family mansions and estates. In such cases, courts of equity will enforce a due observance of the trust, and restrain the parties having a present possession from wasting the property, or doing any acts inconsistent with the trust.⁴

§ 957. Injunctions will also be granted to restrain the sailing of a ship, upon the application of a part-owner, whose share is unascertained, in order to ascertain that share, and to obtain the

¹ *Frewin v. Lewis*, 4 *Mylne & Craig*, 254.

² *Ante*, § 843, 844.

³ [* *Coles v. Sims*, *Kay*, 56; *Child v. Douglas*, *Id.* 560; *Figgott v. Stratton*, *Johnson*, 341. See also *Robotham v. Wilson*, 6 *Jur. N. S.* 965; *S. C.* 3 *Jur. N. S.* 1297. So also to protect party-walls. *Phillips v. Bordman*, 4 *Allen*, 147. And in *Parker v. Nightingale*, 6 *Allen*, 341, it is decided, that, if the owners of a piece of land lay it out into house-lots and orally agree among themselves that it shall be occupied exclusively for dwelling-houses, and accordingly give deeds to purchasers so restricting the use, one who accepts such a deed is bound in equity by the condition; and purchasers of others of the lots, whose estates will be injured by the violation of such condition, may maintain a bill in equity against any one owner or occupier of one of the lots for violating the condition, and thus obtain a perpetual injunction. But see *Hubbell v. Warren*, 8 *Allen*, 173. See, also, *Western v. Macdermot*, 12 *Jur. N. S.* 366. The tenant from year to year, and the purchaser of one whose title is restricted to particular uses, must take notice of the extent of the title under which he enters. *Wilson v. Hart*, 12 *Jur. N. S.* 460.]

⁴ *Ante*, § 843, 844, and note, § 845; *Cadogan v. Kennet*, *Cowp.* 435, 436; *Co. Litt.* 20 *a*; *Hargrave's note* (5).

usual security, given in the admiralty, for the due return of the ship.¹ So, they will be granted against the removal of timber, which has been wrongfully cut down.²

[* § 957 *a.* So, also, where the plaintiffs, who were a company of ship-owners on whose account the defendant, as their broker, had effected policies, had instituted proceedings against the defendant, in a competent tribunal abroad, for an account, in which the defendant had appeared; but before final decree in the foreign court the defendant had commenced actions in England against the insurers; it was held, on demurrer, that it was competent for the plaintiff to file a bill to restrain the action, and to have a receiver of the policy-moneys, pending the foreign litigation.³ Where a party had been induced, by fraudulent misrepresentations or misunderstanding, to accept a lease of coal mines, at a certain rent, which he had covenanted to pay and also to work the mines, it was held that the Court of Equity would not restrain an action for the rent, although the coal proved to be not worth the expense of working, but that, if a suit were to be brought upon the covenant to work the mine, the court would interfere.⁴

§ 957 *b.* The question of allowing injunctions operating exclusively *in personam*, where the subject-matter of the controversy is not within the jurisdiction of the court, was carefully considered in a recent case.⁵ It was held, that where there is no privity between the parties, the plaintiff cannot enforce a lien against immovable property in a foreign country, although both the parties reside within the jurisdiction; and the court will not pronounce a decree *in personam* even, where it cannot be enforced without the intervention of a foreign court; that a proceeding in equity can only be maintained in the forum of the residence of the parties to enforce a lien upon real property in a foreign country, on the ground of special circumstances arising out of the dealings between the parties. If the plaintiff makes out a case for the interference of the court to declare a lien, in his favor, upon real estate in a foreign country, on account of the special dealings between the parties, the court will do it, and in some cases grant a

¹ *Haley v. Goodson*, 2 Meriv. R. 77; *Christie v. Craig*, 2 Meriv. R. 137; *Abbott on Shipp.* Pt. 1, ch. 3, § 4, 5. [But see *Castelli v. Cook*, 13 Jurist, 675.]

² *Anon.* 1 Ves. Jr. 93.

³ *Transatlantic Company v. Pietroni, Johnson*, 604.

⁴ *Ridgway v. Sneyd, Kay*, 627.

⁵ *Norris v. Chambres, et per contra*, 7 Jur. N. S. 59; S. C. Id. 689.

receiver, but will leave the plaintiff to make it available as he can or not, by means of the foreign tribunals. The English courts of equity will assist foreign courts to unravel complications, and as far as the law allows, and it comes within their jurisdiction, carry into effect the judgments of foreign courts, when properly brought under their cognizance.

§ 957 *c.* And under insolvent laws it has been held, that a court of equity will enjoin one creditor from pursuing an attachment in another State, and thereby preventing the property from coming to the assignee under the insolvent laws of the former, and thus being equally distributed among the creditors.¹ The creditor thus enjoined from pursuing his remedy in a foreign forum will be entitled to have his costs paid up to the time of leaving notice of the bill, and after that will be liable to pay costs.²

§ 958. Injunctions will also be granted to compel the due observance of personal covenants, where there is no effectual remedy at law.³ Thus, in the old case of the parish-bell, where certain persons owning a house in the neighborhood of a church entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their disturbance. The agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour.⁴ Upon the same ground a celebrated play-writer, who had covenanted not to write any dramatic performances for another theatre, was, by injunction, restrained from violating the covenant.⁵ So, an author, who had sold his copyright in a work, and

¹ *Dehon v. Foster*, 4 Allen, 545; S. C. 7 Allen, 57.

² *Dehon v. Foster*, 7 Allen, 57.]

³ *Ante*, § 710, 718, 721, 722, 850.

⁴ *Martin v. Nutkin*, 2 P. Will. 266. [See *Soltau v. De Held*, 9 Eng. Law & Eq. Rep. 104.]

⁵ *Morris v. Colman*, 18 Ves. 437; *Clark v. Price*, 2 Wils. Ch. R. 157. But a court of equity will not decree a specific performance of a contract by an actor, that he would act twenty-four nights at a particular theatre, during a certain period of time, and that he would not, in the mean time, act at any other theatre in the same town. *Kemble v. Kean*, 6 Simons, R. 333; *Sanquirico v. Benedetti*, 1 Barbour, 315. And as it would not decree a specific performance in such a case, the Vice-Chancellor thought it ought not to restrain the defendant from acting at another theatre, that is, from breaking the negative part of his covenant. In this judgment the Vice-Chancellor commented at large upon the case of *Morris v. Colman*, and *Clark v. Price*, from which he labored to distinguish the case before him. His reasoning, it must be confessed, has not relieved the subject from all doubt. *Ibid.* See, also, *Kimberley v. Jennings*, 6 Simons, R. 340. [And see *Rolfe v. Rolfe*, 15 Sim. 88; *Hills v. Crall*, 2 Phillips, 66.]

covenanted not to publish any other to its prejudice, was restrained by injunction from so doing.¹

[* § 958 *a*. Notwithstanding some apparent vacillation in the decisions of the English courts of equity, in regard to the propriety of enforcing the negative portion of a contract by injunction, where they cannot enforce the specific performance of the affirmative counter stipulations, which constitute the main basis of the contract, it seems now to be left to depend very much upon the character of such stipulations. For notwithstanding the elaborate review of the cases upon this point by Lord St. Leonards, in *Lumley v. Wagner*,² and the distinct declaration that *Kemble v. Kean*,³ and *Kimberley v. Jennings*,⁴ “were wrongly decided and cannot be maintained”; and that the court would interfere to prevent the violation of the negative stipulation in a contract, although it could not enforce the specific performance of the entire contract; when the subject came under review, in the case of the *South Wales Railway v. Wytches*,⁵ the injunction was denied, although the principle involved was precisely the same, the court declining to interfere, on the ground of the indefiniteness of the contract, and that its details could not be supplied, in the ordinary modes of procedure, in courts of equity.⁶]

§ 959. Courts of equity also interfere, and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for possession of the property in controversy; as, for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance.⁷ In-

¹ *Barfield v. Nicholson*, 2 Sim. & Stu. 1; *Kimberley v. Jennings*, 6 Sim. R. 340.

² [* 1 De G. M. & G. 604.

³ 6 Simons, 333.

⁴ 6 Simons, 340.

⁵ 5 De G. M. & G. 880. See also *Rolfe v. Rolfe*, 15 Sim. 88; *Hills v. Croll*, 2 Phillips, 60; and the numerous cases cited and reviewed by Lord St. Leonards, in *Lumley v. Wagner*.

⁶ So also an agreement to take the lease of a house, if put into thorough repair, and the “drawing-room handsomely decorated according to the present style,” was held too uncertain for the court to enforce. *Taylor v. Portington*, 7 De G. M. & G. 328.]

⁷ *Stribley v. Hawkie*, 3 Atk. 275; *Penn v. Lord Baltimore*, 1 Ves. 454; *Dove v. Dove*, 1 Cox, R. 101; S. C. 1 Bro. Ch. R. 373; 2 Dick. 617; *Huguenin v. Baseley*, 15 Ves. 180; *Roberdeau v. Rous*, 1 Atk. 549; *Kershaw v. Thompson*, 4 Johns. Ch. R. 612 to 618.

junctions of this sort are older than the time of Lord Bacon, since, in his Ordinances, they are treated as a well-known process. Indeed, they have been distinctly traced back to the reign of Elizabeth, and Edward the Sixth, and even of Henry the Eighth.¹ In some respects they bear an analogy to sequestrations; but the latter process, at least since the reign of James the First, has been applied, not merely to the lands in controversy in the cause, but also to other lands of the party.²

§ 959 *a.* It has been already suggested, that the granting or refusing of injunctions is a matter resting in the sound discretion of a court of equity;³ and, consequently, no injunction will be granted whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case; or, where it is not the fit and appropriate mode of redress under all the circumstances of the case; or, where it will or may work an immediate mischief, or fatal injury. Thus, for example, no injunction will be granted to restrain a nuisance, by the erection of a building, where the erection has been acquiesced in, or encouraged by the party seeking the relief.⁴ So, it will not be granted in cases of gross laches or delay by the party seeking the relief in enforcing his rights; as, for example, where, in case of a patent or a copyright, the patentee has lain by, and allowed the violation to go on for a long time, without objection, or seeking redress.⁵ On the other hand, a cov-

¹ Eden on Injunct. ch. 17, p. 363, 364; Id. App. 380; Beam. Ord. Ch. 15, 16; Kershaw v. Thompson, 4 Johns. Ch. R. 612 to 618. It has been remarked by Mr. Chancellor Kent, in his Commentaries (4 Kent Comm. Lect. 58, p. 191, 192, 3d edit.), that, "Upon a decree for a sale [of mortgaged property] it is usual to insert a direction, that the mortgagor deliver up possession to the purchaser. But whether it be or be not a part of the decree, a court of equity has competent power to require by injunction, and enforce by process of execution, delivery of possession; and the power is founded upon the simple elementary principle, that the power of the court to apply the remedy is extensive with its jurisdiction over the subject-matter." He cites, among other cases, Dove v. Dove, 2 Dick. 617; S. C. 1 Bro. Ch. R. 373, and Belt's note; S. C. 1 Cox, R. 101; Kershaw v. Thompson, 4 Johns. Ch. R. 609. In this last case the whole of the leading authorities were historically and critically examined.

² Ibid. and note (c), p. 363; Beames, Ord. Chan. 16, and note 55; Barton, Suit in Eq. 87; 2 Madd. Ch. Pr. 163; Hide v. Petit, 1 Ch. Cas. 91.

³ *Ante*, § 862, 863; Bacon v. Jones, 4 Mylne & Craig, 433; Bramwell v. Halcomb, 3 Mylne & Craig, 737; Bennett v. Smith, 10 Eng. Law & Eq. R. 272.

⁴ Williams v. Earl of Jersey, 1 Craig & Phillips, 91.

⁵ Saunders v. Smith, 3 Mylne & Craig, R. 711; Lewis v. Chapman, 3 Beavan, R. 133.

enant may be of such a nature, as ought not, in equity, to be specifically enforced by an injunction, in consideration of the unreasonable and inconvenient consequences which may ensue therefrom. Thus, where it was covenanted by the lessee of an inn, that he would keep it open, and not discontinue it, the court refused to grant an injunction to enforce the specific performance of the covenant.¹ It is obvious, that the granting of the injunction in such a case might be utterly useless, and, moreover, be attended with ruinous consequences to the lessee. Upon similar principles a court of equity will not by injunction compel a person to fulfil a contract to write dramatic performances for a particular theatre;² or, to act a certain number of nights at a particular theatre;³ [or, to compel an employer to retain a servant, agent, or manager; or to restrain him from excluding such person;⁴] or to furnish maps, which the plaintiff is to have the sole privilege of engraving and publishing.⁵ [* When public interests, or the rights of large classes, are involved, an injunction will not be granted, except upon notice and hearing, and then not, if it seem probable that it will produce serious embarrassment to such public, or quasi public, interest.⁶ This is no just remedy against illegal taxation.⁷]

§ 959 *b*. It may be remarked, in conclusion, upon the subject of special injunctions, that courts of equity constantly decline to lay down any rule, which shall limit their power and discretion as to

¹ *Hooper v. Brodick*, 11 Simons, R. 47. On this occasion the Vice-Chancellor said: "The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same, in effect, as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or using, or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shown that the defendant has threatened, or intends to do or cause, or permit to be done, any act whereby the licenses may become forfeited or be refused; and, therefore, the injunction must be dissolved."

² *Morris v. Colman*, 18 Ves. 437; *Clark v. Price*, 2 Wils. Ch. R. 157.

³ *Kemble v. Kean*, 6 Simons, R. 333; [*Burton v. Marshall*, 4 Gill, 487. But see *Lumley v. Wagner*, 16 Jur. 871; 13 Eng. Law & Eq. R. 252, *contra*.]

⁴ *Stocker v. Brockelbank*, 5 Eng. Law & Eq. R. 67.

⁵ *Baldwin v. Society for Diffusing Useful Knowledge*, 9 Simons, R. 393.

⁶ [* *Society, &c. v. Butler*, Beasley, R. 499.

⁷ *Wilson v. The Mayor of New York*, 4 E. D. Smith, 675; *Dodd v. Hartford*, 25 Conn. R. 232.]

the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights, or redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time it must be admitted, that the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public, as well as private welfare, it may become a means of extensive, and, perhaps, of irreparable injustice.¹

[* § 959 c. Where persons had purchased family graves in perpetuity in a private burying-ground, which was afterwards closed

¹ See the pointed remarks of Lord Cottenham on this subject, in *Brown v. Newhall*, 2 Mylne & Craig, 570, 571. See also Lord Brougham's remarks in the case of the *Earl of Ripon v. Hobart*, 1 Cooper, Sel. Cases, 333; S. C. 3 Mylne & Keen, 169. Mr. Justice Baldwin, in *Bonaparte v. Camden and Amboy Railroad Company*, 1 Baldwin's Cir. R. 218, made the following remarks on the same subject: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. But that will not be awarded in doubtful cases, or new ones, not coming within well-established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who pays for it. It will be refused, till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows, to prevent the commission of such act. We know of no rule, which excludes from this process any persons over whom the court has jurisdiction, on account of the character or capacity in which he acts, although it is conferred upon him by a law of a State or of Congress." Railways have recently given rise to many questions as to the duty of courts of equity to interfere and prevent mischiefs to private property by an excess or abuse or misapplication of the corporate powers of the companies. See *Nicoll & Hare's Reports of Cases relating to Railways*, where the recent decisions are collected. See also *Barnard v. Willis*, 1 Craig & Phillips, 85; *Durham and Sunderland Railway Company v. Wawn*, 3 Beavan, R. 119.

by order of the Queen in council, although no formal grant was executed, but their title was evidenced by a receipt for the purchase-money, it was held that they were entitled to an injunction to restrain the trustees from removing or injuring the graves, or gravestones.¹

§ 959 *d.* In cases where the party, obtaining an injunction, gives security to abide by any order the court may make respecting damages to the adversary, and the question is finally decided against the application, the defendant is entitled to have the damages ascertained and paid; and that a mere dismissal of the cause, with costs to defendant, is not a sufficient ascertainment of the damages. That is to be assessed by a reference to the master, or a trial by jury in the discretion of the court.²

§ 959 *e.* There are many cases where courts of equity will enjoin a party, who has obtained the possession of property under a contract, from violating the terms of such contract. And the owner of a vessel was enjoined from doing any act inconsistent with a charter-party into which he had entered.³ Where A. was appointed manager of a voluntary society for the purpose of selling religious books on the society's premises, with a right to reside on part of the society's premises, and to carry on the trade of a bookseller on his own account, and to have six months' notice to quit; differences having arisen between him and the Managing Committee, they required him to quit possession, which he refused to do, and maintained himself in the possession by force. The court granted an injunction restraining A. from acting as manager, with liberty for him to reside on the premises for two months, and to remove his property.⁴ This was a case where the defendant seemed to have retained the possession in defiance of the managers of the society, and in mere wantonness, and not with any view to carry out either his own business arrangements or those of the society. He was sustained by the majority of the shareholders, acting in opposition to the managers; but the court considered themselves bound by the action of the managers, and

¹ [* *Moreland v. Richardson*, 22 Beavan, 596.

² *Novello v. James*, 5 De G. M. & G. 876. This question is very extensively examined by the present Chief Justice Pierpoint, of Vermont, in an important case. *Sturgis v. Knapp*, 33 Vt. R. 486.

³ *Sevin v. Deslandes*, 7 Jur. N. S. 837.

⁴ *Spurgin v. White*, 7 Jur. N. S. 15.

granted the order above recited, with a view to extricate the parties from their present conflict, adding a special order, that all which was done by the court should be without prejudice to any legal right which the defendant might have to recover damages at law for any infringement of his rights by the action of the managers, even while acting under the order of the court; and requiring a stipulation on the part of the plaintiffs, by their counsel, to abide by any order which the court should ultimately make, as to damages, and in other respects to give the defendant all privileges contained in the preceding order of the court. The case may be useful as illustrating the course adopted by the English courts of equity, with a view to cut loose all obligations, for the time, and place the parties in a position to avoid conflict and preserve property from loss or destruction.¹

§ 959 f. The English courts of equity decline to interfere by injunction to restrain corporators from applying to the legislature either of that or of a foreign country, where the grant was originally in another country, for an enlargement of the powers of the corporation.² And those courts will not interfere with grants obtained by resident citizens of England, in foreign countries, in order to determine how far such grants interfere with each other. But a foreign sovereign, having entered into a contract with British subjects, and subsequently made another grant, in derogation of the first concession, the English courts will not restrain the second grantees from doing, in a foreign country, whatever they are authorized to do by the sovereign power there.³ But the court has jurisdiction, at the suit of one English citizen against another English citizen, in whose hands a fund is placed, subject, at law, to the sole control of a foreign sovereign or ambassador, to restrain the defendant from parting with the fund upon the order of such foreign sovereign or ambassador.⁴

§ 959 g. It has recently been decided,⁵ that, where a court of

¹ The court here considered themselves justified in the decree pronounced by them, by the case of *Doe d. v. Jones*, 10 B. & Cr. 718; *Doe d. v. McKaeg*, Id. 721; *Perry v. Shipway*, 1 Giff. 1; S. C. 5 Jur. N. S. 535; on app. 1015; S. C. 3 De G. & J. 353. Considering that the defendant became a wrongdoer by attempting to hold possession after the determination of his authority by the action of the managers, but saving defendant's right to sue at law.

² *Bill v. Sierra Nevada L. W. & M. Company*, 1 De G. F. & J. 177.

³ *Gladstone v. Ottoman Bank*, 9 Jur. N. S. 246, S. C. 1 H. & M. 505.

⁴ *Gladstone v. Mussurus Bey*, 9 Jur. N. S. 71; S. C. H. & M. 495.

⁵ *Hope v. Hope*, 8 De G. M. & G. 731.

one country is called upon to enforce a contract entered into in another, it is not enough that the contract is valid by the law of the country where it is entered into. For if any part of the contract be inconsistent with the law and policy of the country where it is sought to be enforced, it will not there be carried into effect, even as to particulars which are not obnoxious to the spirit of the law of that country. Hence, where an Englishman married a Frenchwoman, and they resided and had children born in France, and suits were instituted between them, in both countries, and were compromised by an agreement, of which part was, that the wife would facilitate proceedings for divorce, and that one of the children should remain with the mother, and a certain allowance also be made her, it was held, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid by that law, and to have been performed as to the parts which were invalid by the English law, it could not be enforced in England, as to any part of it.

§ 959 *h*. The courts of equity in England have jurisdiction to decree distribution of a fund in the hands of a stakeholder in that country, although the same is not invested in land or public stocks of the country, and although some of the parties interested in the fund reside out of the jurisdiction; and if the plaintiff has done all in his power to bring such parties into the suit, by giving them information of the proceedings, and they refuse to appear, the fund will be distributed in their absence.¹ And in another branch of the same case,² it was held, that the United States government succeeded to all the property rights of the Confederate government, after the seceding States submitted to the former government; but this right must be exercised in England, subject to any property rights acquired by English subjects by contract with the Confederate authority.]

¹ *Central Railw. & Banking Co. Georgia v. Mitchell*, 11 Jur. N. S. 258.

² *United States Government v. Prioleau*, id. 792.]

CHAPTER XXIV.

EXCLUSIVE JURISDICTION. — TRUSTS.

- [* § 960. Exclusive jurisdiction. Trusts and remedial process.
 § 961. Trusts include most of the exclusive equitable jurisdiction.
 § 962, 963. And are generally administered only in courts of equity.
 § 964. Trusts are equitable rights, and require definition, subject, and object.
 § 965. This jurisdiction derived from the Roman civil law.
 § 966. History of trusts in the Roman law.
 § 967. Uses and trusts have a similar origin.
 § 968. Lord Coke's definition of uses and trusts.
 § 969. They have an extensive and highly beneficial operation.
 § 970. The statute of uses transfers the use to possession.
 § 971. Uses, by parol, at common law, now created by deed.
 § 972. Statute of frauds requires trusts as to lands to be declared by writing, except resulting trusts.
 § 973. Equity will only execute trusts founded on valuable consideration.
 § 974. Equitable estates partake of the incidents of legal estates.
 § 974 a. Trusts alienable by contract and by operation of law.
 § 975. Trusts follow the analogy of the law as to remedies.
 § 975 a. Courts of equity generally hold exclusive control of trusts.
 § 976. Equity compels the party holding the legal title to act as trustee for equitable interests.
 § 977. Such equity is not defeated by alienation except to a *bonâ fide* purchaser.
 § 977 a. Grounds upon which the purchaser may be affected by trust.
 § 978. The powers of trustees depend upon the nature of the trust.
 § 979. *Cestui que trust* may sometimes demand the conveyance of legal title.
 § 979 a, 979 b. Trusts may wholly fail from uncertainty.
 § 980. Definition of express and implied trusts.
 § 981. Specification of express trust, from which many implied trusts arise.

[§ 960. WE shall now consider the exclusive jurisdiction of courts of equity, which is divided into two branches, the one dependent upon the subject-matter, the other upon the nature of the remedy.] The former comprehends TRUSTS, in the largest and most general sense of the word, whether they are express or implied, direct or constructive, created by the parties, or resulting by operation of law. The latter comprehends all those processes or remedies, which are peculiar and exclusive in courts of equity, and through the instrumentality of which they endeavor to reach the purposes of justice in a manner unknown or unattainable at law.

§ 961. Trusts, in the general sense above alluded to, will be

found directly or remotely to embrace most of the subjects of their exclusive jurisdiction. It has been well observed, that the principles of law, which guide the decisions of the courts of common law, were principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. Hence, it has happened, that there are many rights, according to the principles of natural and universal justice, for injuries to which the law, as administered by those courts, has provided no remedy. This is particularly the case in matters of trust and confidence, of which the ordinary courts of law, in a vast variety of instances, take no cognizance. The positive law being silent on the subject, courts of equity, considering the conscience of the party intrusted, as bound to perform the trust, have, to prevent a total failure of justice, interfered to compel the performance of it.¹ And, as they will compel the performance of the trust, so, on the other hand, they will assist the trustees, and protect them in the due performance of the trust, whenever they seek the aid and direction of the court as to the establishment, the management, or the execution of it.²

§ 962. For the most part, indeed, matters of trust and confidence are exclusively cognizable in courts of equity; there being few cases, except bailments, and rights founded in contract, and remedial by an action of assumpsit, and especially by an action for money had and received, in which a remedy can be administered in the courts of law.³ Thus, for example, a debt, or *chose in action*, is not generally assignable at law, except in cases of negotiable instruments.⁴ And, hence, the assignee is ordinarily compellable to seek redress against the assignor and the debtor solely in courts of equity.⁵

[* § 963. It is not intended to discuss minutely the entire subject of trusts. They find exclusive administration in courts of equity, except the very limited relief afforded in courts of law.]

§ 964. A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equita-

¹ Mitf. Eq. Pl. by Jeremy, 4; Id. 133.

² Id. 134.

³ Cooper on Eq. Pl. Introd. p. 27; 3 Black. Comm. 482; 2 Fonbl. Eq. B. 2, ch. 1, § 1, note (a); Sturt v. Mellish, Atk. 610; Co. Litt. 290 b; Butler's note, 246, § xv.

⁴ Post, § 1039.

⁵ Com. Dig. Assignment, C. 1; Com. Dig. Chancery, 2 H.; Post, § 1057.

ble right, title, or interest in property, real or personal, distinct from the legal ownership thereof.¹ In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute the trusts, which courts of equity will compel the legal owner, as trustee, to perform in favor of the *cestui que trust*, or beneficiary. Three things are said to be indispensable to constitute a valid trust: first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object.²

§ 965. It is in the highest degree probable, that those trusts, which are exclusively cognizable in courts of equity, were, in their origin, derived from the Roman law, being very similar, in their nature, to the *fidei commissa*, of that law. As the jurisdiction of a peculiar prætor was created for the express purpose of protecting property *fidei commissum*, so the jurisdiction of our courts of equity, if not created, was soon extended, for the purpose of protecting and enforcing the execution of trusts.³ Indeed, it is impossible to suppose, that, in a country professing to have an enlightened jurisprudence, obligations and trusts in regard to property, binding in conscience and duty, and which, *ex æquo et bono*, the party ought to perform, should be left without any positive means of securing their due fulfilment; or, that they might be violated without rebuke, or evaded with impunity.

§ 966. In the Institutes of Justinian, a summary account is given of the origin and nature of the Roman *fidei commissa*. It is there observed, that anciently all trusts were infirm (precarious); for no man could, without his own consent, be compelled to perform what he was requested to do. But, when testators were unable directly to bequeath an inheritance or legacy to certain persons, if they did bequeath it to them, they gave it in trust to other persons, who were capable of taking it by will. And

¹ Lord Hardwicke, in *Sturt v. Mellish* (2 Atk. 612), said: "A trust is, where there is such a confidence between parties, that no action at law will lie; but is merely a case for the consideration of this court."

² *Cruwys v. Colman*, 9 Ves. 323.

³ 2 Fonbl. Eq. B. 1, ch. 1, § 1, note (a); 2 Black. Comm. 327, 328.

therefore such bequests were called trusts (*fidei commissa*), because they could not be enforced by law, but depended solely on the honor of those to whom they were intrusted. Afterwards, the Emperor Augustus, having been frequently solicited in favor of particular persons, either on account of the solemn adjurations of the party, or on account of the gross perfidy of other persons, commanded the consuls to interpose their authority. This, being a just and popular order, was by degrees converted into a permanent jurisdiction. So great, indeed, was the favor in which trusts were held, that at length a special prætor was created to pronounce judgment in cases of trusts; and hence he was called the Commissary of Trusts (*Fidei Commissarium*).¹

§ 967. This brief sketch of the origin and nature of trusts in the civil law does, in a very striking manner, illustrate the origin and nature of trusts in the common law of England, in regard to real property. It has been well remarked by Mr. Justice Blackstone, that uses and trusts in English jurisprudence are, in their original, of a nature very similar, or rather exactly the same, answering more to the *fidei commissum*, than to the *usus fractus* of the civil law; the latter being the temporary right of using a thing, without having the ultimate property or full dominion of the substance.²

§ 968. Lord Coke, describing the nature of a use or trust in land according to the common law, uses the following language: A use is a trust or confidence reposed in some other, which is not issuing out of the land, but, as a thing collateral, annexed in privacy to the estate of the land, and to the person touching the land; *scilicet*, that *cestui que use* (the beneficiary) shall take the profit, and that the term-tenant shall make an estate according to his direction. So, as *cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law; but for breach of trust his remedy was by subpoena in chancery.³ Thus, we see, that the original fiduciary estate, from its nature, imparted a right to the enjoyment of the profits of the land, as distinct from the seisin of the land, and the rights issuing thereout.

¹ Inst. B. 2, tit. 23, § 1, Vinn. ad Inst. h. t. Comm.; 2 Black. Comm. 327, 328; Bac. on Uses, 19.

² Black. Comm. 327; Bac. on Uses, 19.

³ Co. Lit. 272 b; Chudleigh's case, 1 Co. Rep. 121 a, b; Bac. Abridg. *Uses and Trusts*, A. B.; 2 Fonbl. Eq. B. 2, ch. 1, § 2; Com. Dig. *Chancery*, 4 W.; *Fisher v. Fields*, 10 Johns. Rep. 505, 506.

§ 969. The introduction of uses and trusts into England has been generally attributed to the ingenuity of the clergy, in order to escape from the prohibitions of the Mortmain Acts. But, whether this be the true origin of them or not, it is very certain that the general convenience of them in subserving the common interests of society, as well as in enabling parties to escape from forfeitures in times of civil commotion, soon gave them an extensive public approbation, and secured their permanent adoption into the system of English jurisprudence.¹ And they have since been applied to a great variety of cases, which never could have been in the contemplation of those who originally introduced them; but which, nevertheless, are the natural attendants upon a refined and cultivated state of society, where wealth is widely diffused, and the necessities and conveniences of families, of commerce, and even of the ordinary business of human life, require, that trusts should be established, temporary or permanent, limited or general, to meet the changes of past times, as well as to provide for the exigencies of times to come.

§ 970. According to the spirit of over-nice and curious learning belonging to the age, uses in lands, upon their introduction into English jurisprudence, were refined upon with many elaborate distinctions,² to cure the mischiefs arising from which the Statute of Uses of 27 Henry VIII. ch. 10, was enacted, the general intent of which was, to transfer the use into possession, and to make the *cestui que use* complete owner of the lands, as well at law as in equity.³ But as the statute did not in its terms apply to all sorts of uses, and was construed not to apply to uses ingrafted on uses (which constitute one great class of modern trusts in lands), it failed in a great measure to accomplish the ends for which it was designed.⁴ Thus, for example, it was held not to apply to trusts or uses created upon term of years; or to trusts of a nature requiring the trustee still to hold out the estate, in order to per-

¹ 2 Black. Comm. 328, 329; Bac. Abridg. *Uses and Trusts*, A. B.; Gilb. Lex. Prætor, 259, 260. See also *Lloyd v. Spillet*, 2 Atk. 149, 150; *Hopkins v. Hopkins*, 1 Atk. 591; *Ante*, § 48.

² 2 Black. Comm. 330.

³ 2 Black. Comm. 332, 333; 2 Fonbl. Eq. B. 1, ch. 1, § 2, 3; Butler's note (231) to Co. Litt. 271 b.

⁴ *Ibid.*

form the trusts; and, generally, not to trusts created in relation to mere personal property.¹

§ 971. In regard to uses it seems formerly to have been a matter of considerable doubt, whether at the common law they could be raised by parol, or even by writing without a seal. Lord Chief Baron Gilbert has extracted a distinction from the different cases, which will in some measure reconcile their apparent contrariety. It is in effect, that a use might be raised at the common law by parol upon any conveyance, which operated by way of transmutation of possession, or passed the possession by some solemn act, such as a feoffment; since the estate itself might, by the common law, pass by a parol feoffment; and therefore, by the same reason, a use of the estate might be declared by parol. But where a deed was requisite to the passing of the estate itself, there a deed was also necessary for the declaration of the uses. Thus, for example, a man could not covenant to stand seised to use without a deed.²

§ 972. However this may have been, the Statute of Frauds of 29 Charles II. ch. 3, § 7, (which has been generally adopted in America,) requires all declarations or creations of trusts or confidences of any lands, tenements, and hereditaments to be manifested and proved by some writing, signed by the party entitled to declare such trusts, or by his last will in writing. The statute excepts trusts arising, transferred, or extinguished by operation of law; and from its terms, it is apparent that it does not extend to declarations of trusts of personalty.³ Neither does it prescribe any particular form or solemnity in writing; nor that the writing should be under seal. Hence, any writing sufficiently evincive of a trust, as a letter, or other writing of a trustee, stating the trust, or any language in writing, clearly expressive of a trust, intended

¹ 2 Black. Comm. 335 to 337; *Sympson v. Turner*, 1 Eq. Abridg. 383; Butler's note (1) to Co. Litt. 290 *b*, and to Co. Litt. 271 *b*, note (1), iii. § 5; Bac. Abridg. *Uses and Trusts*, B. C. D. G. 2 H.; Id. *Trusts*, A.; 2 Fonbl. Eq. B. 2, ch. 1, § 4; 2 Wooddes. Lect. 29, p. 295 to 297. It is said; that a tenant by the courtesy cannot stand seised to a use, for he is in by the act of law in consideration of marriage, and not in privity of estate; and for a like reason also tenant in dower, by the better opinion, cannot stand seised to a use. Sanders on Uses, ch. 1, § 11, p. 62, 63; 2 Fonbl. Eq. B. 2, ch. 6, § 1, note (a). But in equity such a tenant would nevertheless be affected by the use or trust.

² Gilb. *Uses*, 270, 271; 2 Fonbl. Eq. B. 1, ch. 2, § 1, note (b); Id. § 3.

³ *Ante*, § 793 *a*; *Post*, § 987, 1040; 2 Fonbl. Eq. B. 2, ch. 2, § 4, and note (x); *Nab v. Nab*, 10 Mod. 404; *Fordyce v. Willis*, 3 Bro. Ch. R. 586; 2 Black. Comm. 337; *Benbow v. Townsend*, 1 Mylne & Keen, 506.

by the party, although in the form of a desire or a request, or a recommendation, will create a trust by implication.¹ And where a trust is created for the benefit of a third person, although without his knowledge, he may afterwards affirm it, and enforce the execution of it in his own favor² at least, if it has not, in the intermediate time, been revoked by the person who has created the trust.³

§ 973. Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or some valuable consideration; for courts of equity will not enforce a mere gratuitous gift (*donum gratuitum*), or a mere moral obligation.⁴ Hence it is, that, if there be a mere voluntary executory trust created, courts of equity will not enforce it.⁵ And, upon the same ground, if two persons for a valuable consideration, as between themselves, covenant to do some act for the

¹ 2 Fonbl. Eq. B. 2, ch. 2, § 4, and note (x), and cases there cited; *Cook v. Brooking*, 3 Vern. 106, 107; *Inchiquin v. French*, 1 Cox, 1; *Smith v. Attersoll*, 1 Russ. R. 266.

² *Cumberland (Duke of) v. Codrington*, 3 Johns. Ch. R. 261; *Shepherd v. McEvers*, 4 Johns. Ch. R. 136; *Neilson v. Blight*, 1 Johns. Cas. 205; *Weston v. Barker*, 12 Johns. R. 276; *Moses v. Murgatroyd*, 1 Johns. Ch. R. 119, 473; *Nicoll v. Mumford*, 4 Johns. Ch. R. 529; *Ante*, § 793 a; *Post*, § 1073, note, 1040, 1042, 1196.

³ *Acton v. Woodgate*, 2 Mylne & Keen, 492. It is now clearly settled that, if a debtor conveys property in trust, for the benefit of his creditors, to whom the conveyance is not communicated, and the creditors are not in any manner parties or privy to the conveyance, the deed merely operates as a power to the trustees, which is irrevocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment or communication with the creditors had recalled it. *Ibid.*; *Wallwyn v. Coutts*, 3 Meriv. R. 707; S. C. 3 Sim. R. 14; *Gerrard v. Lord Lauderdale*, 3 Sim. R. 1; *Post*, § 1036 a, 1044, 1045, 1046, 1196; *Maber v. Hobbs*, 2 Younge & Coll. 317, 327; *Wallwyn v. Coutts*, 3 Meriv. 708; *Lane v. Husband*, 14 Simons, R. 656.

⁴ 2 Fonbl. Eq. B. 1, ch. 2, § 2, and notes (f), (g), (i); 2 Bl. Comm. 330; 1 Fonbl. Eq. B. 1, ch. 6, § 9; *Colman v. Sarrel*, 1 Ves. Jr. 53, 54; *Ante*, § 433, 706 a, 787, 793 a; *Post*, § 986, 987; *Colyear v. Countess of Mulgrave*, 2 Keen, 81, 97, 98; *Ellis v. Nimmo, Lloyd & Goold*, R. 333; *Holloway v. Headington*, 8 Sim. R. 324; *Gaskell v. Gaskell*, 2 Younge & Jerv. 502. But see *Moore v. Crofton*, 3 Jones & Lat. 438; *Ante*, § 433, 706, 706 a; *Post*, § 793, 973, 987, 1040 b.

⁵ *Colyear v. Countess of Mulgrave*, 2 Keen, 81, 97, 98; *Collinson v. Patrick*, 2 Keen, R. 123, 134; *Holloway v. Headington*, 8 Sim. R. 329; *Callagan v. Callagan*, 8 Clarke & Fin. 374, 401. [* *Scales v. Maude*, 6 De G. M. & G. 43. The question of what amounts to a gift, *inter vivos*, and what is a direction to executors, is here considerably discussed by Lord Cranworth.]

benefit of a third person, who is a mere stranger to the consideration, he cannot enforce the covenant against the two, although each one might enforce it against the other.¹ But it is otherwise in cases where the use or trust is already created and vested, or otherwise fixed in the *cestui que trust*; or where it is raised by a last will and testament.² Thus, for example, if A. should direct his debtor to hold the debt in trust for B., and the debtor should accept the trust, and communicate the fact to both A. and B., the trust, although voluntary, would be enforced in favor of B., and binding on A.; for nothing remains to be done to fix the trust. So, if A. had declared himself trustee for B. of the same debt, the same doctrine would apply.³

§ 974. Trusts in real property, which are exclusively cognizable in equity, are now in many respects governed by the same rules as the like estates at law, and afford a striking illustration of the maxim *æquitas sequitur legem*. Thus, for example, they are descendible, devisable, and alienable; and heirs, devisees, and assignees may, and generally do, take therein the same interests in point of construction and duration, and they are affected by the same incidents, properties, and consequences, as would, under like circumstances, apply to similar estates at law.⁴ We say generally,

¹ Ibid.; Sutton v. Chetwynd, 3 Meriv. R. 249; 1 Turn. & Russ. 296.

² 1 Fonbl. Eq. B. 1, ch. 6, § 6; Id. § 8, and note (r); 2 Fonbl. Eq. B. 2, ch. 2, notes (f), (g); 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (r); Lechmere v. Earl of Carlisle, 3 P. Will. 222; Austen v. Taylor, Ambler R. 376; S. C. 1 Eden, R. 361; Bunn v. Winthrop, 1 Johns. Ch. R. 329; Petre v. Espinasse, 2 Mylne & Keen, 496; Collinson v. Patrick, 2 Keen, 123, 134; Lewin on Trusts, ch. 9, p. 110 to 137.

³ McFadden v. Jenkins, 1 Phillips, Ch. R. 152. See also Stapleton v. Stapleton, 14 Simons, R. 186.

⁴ 2 Bl. Comm. 337; 1 Madd. Ch. Pr. 360; 3 Wooddes. Lect. 59, p. 478, 480; 1 Wooddes. Lect. 7, p. 209; 1 Fonbl. Eq. B. 1, ch. 6, § 6, 7, and note (n); 1 Madd. Ch. Pr. 360, 361; 2 Fonbl. Eq. B. 2, ch. 3, § 5, 6, ch. 4, § 1, 2; Fisher v. Fields, 10 Johns. R. 494. The most remarkable deviation, in executed trusts, from the rules in relation to legal estates, is that a man may be tenant by the courtesy of a trust estate of his wife; but a woman is not entitled to dower in a trust estate of her husband; 2 Fonbl. Eq. B. 2, ch. 4, § 1, and notes (c) and (d). Lord Redesdale, in D'Arcy v. Blake (2 Sch. & Lefr. 387), has given the best account of the origin of this anomaly. He there observed: "The difficulty in which courts of equity have been involved with respect to dower, I apprehend, originally arose thus: They had assumed, as a principle in acting upon trusts, to follow the law. And, according to this principle, they ought in all cases, where rights attached on legal estates, to have attached the same rights upon trusts, and, consequently, to have given dower of an equitable estate. It was found, how-

because there are exceptions to the doctrine above stated. Thus, for example, the construction put upon executory trusts arising under agreements and wills, sometimes differs, in equity, from that in regard to executed trusts.¹ And trusts in terms for years and personalty will be often recognized and enforced in equity, which would be wholly disregarded at law.²

ever, that, in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country, for that parties had been acting on the footing of the dower, upon a contrary principle, and had supposed that, by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to the tenancy by the courtesy, for no person would purchase an estate subject to tenancy by the courtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the courtesy. It was necessary for the security of purchasers of mortgagees and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the courtesy. Pending the overture a woman could not alienate without her husband; and, therefore, nothing she could do could be understood by a purchaser to affect his interest. But, where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach. And the general opinion having long been, that dower was a mere legal right, and that, as the existence of a trust estate, previously created, prevented the right of dower (from) attaching at law, it would also prevent the property from all claim of dower in equity; and many titles depending on this opinion, it was found that it would be mischievous, in this instance, to the general principle that equity should follow the law. And it has been so long and so clearly settled that a woman should not have dower in equity, who is not entitled at law, that it would be shaking everything to attempt to disturb the rule."

¹ 3 Wooddes. Lect. 59, p. 480, 481; Co. Litt. 290 b; Butler's note, 246, xiv.; *Ante*, § 56; 1 Fonbl. Eq. B. 1, ch. 6, § 8, note (s); *Fisher v. Fields*, 10 Johns. R. 506. It has been well remarked, that courts of equity take cognizance of trusts only when they are executory, or are not so executed as to be enforced at law. If, therefore, the trust is executed so that it is cognizable at law, and nothing more remains to be done by the trustee, courts of equity will leave the parties to their remedies at law. *Baker v. Biddle*, 1 Baldwin, Cir. Ct. R. 422.

² 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (d); 1 Fonbl. Eq. B. 1, ch. 4, § 20; *Id.* ch. 3, § 1, note (b); *Id.* ch. 4, § 1, note (f); *Id.* ch. 6, § 8, note (s), § 9, note (r); *Austen v. Taylor*, Ambl. 376; *S. C.* 1 Eden, R. 361; *Massenburgh v. Ash*, 1 Vern. 234, 304; *Bac. Abridg. Uses and Trusts*, G. § 2, p. 109, Guillim's edit.; *Wood v. Burnham*, 6 Paige, 513. Hence, in executory trusts created by a will, the rule in *Shelly's case* (as it is called) will not be strictly followed in equity; but the same construction will be had, as governs in regard to marriage articles, if the same intent is apparent on the face of the will. There is, however, a distinction between

§ 974 *a*. Where a trust is created for the benefit of a party, it is not only alienable by him by his own proper act and conveyance marriage articles and executory trusts arising under wills, as to the inference of the intention of the parties. It is stated, *post*, § 984. See *Stonor v. Curwen*, 5 Sim. R. 264; *Roberts v. Dixwell*, 1 West, R. 542; *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227; *Wood v. Burnham*, 6 Paige, R. 513, 519; 4 Kent, Comm. Lect. 59, p. 218; *Post*, § 983, 985. See, also, 2 Fonbl. Eq. B. 1 ch. 4, § 6; Co. Litt. 290 *b*, Butler's note, 246, X; 1 Ch. Pr. 1 Madd. 260; Com. Dig. Chancery, 4 W. 5, 4 W. 19; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 31, 32; Id. p. 53, 56, 62, 63; *Ante*, § 56. Mr. Butler's note to Co. Litt. 590 *b*, contains so valuable a summary of the general doctrine on this subject, that it deserves to be here stated at large: "It is to be observed that, in most cases, particularly those which relate to real property, court of equity have generally endeavored that their decisions should bear the strictest possible analogy to the decisions of courts of law, in cases of a similar or corresponding impression. All the canons of law, respecting the descent or inheritance of legal estates in lands, have been applied to trust or equitable estates. Some of these, as the exclusion of the half-blood of the ascending line, of the paternal line from the maternal inheritance, and the maternal line from the paternal inheritance, are evidently of feudal extraction, and are generally supposed to be contrary to reason and equity. Yet they have been admitted, without any limitation, into the equitable code of England. There is the same division in equity as there is at law, of estates of freehold and inheritance of estates of freehold only, and of estates less than freehold; of estates in possession, remainder, or reversion; and of estates several and estates undivided. It has been observed before, that every species of property is in substance equally capable of being settled in the way of entail; and that the utmost term allowed for the suspense either of real or personal property from vesting absolutely, is that of a life or lives in being, and twenty-one years after, and perhaps in the case of a posthumous child, a few months more. The analogy between law and equity is in this instance complete. It may be laid down, without any qualification, that no nearer approach to a perpetuity can be made through the medium of a trust, or will be supported by a court of equity, than can be made by legal conveyances of legal estates or interests, or will be admitted in a court of law. In these leading rules we find the analogy holds. In some instances it fails. Courtesy has been admitted; dower, though a more favored claim, has been refused in equitable estates. An equitable estate is, by its nature, incapable of livery of seisin, and of every form of conveyance which operates by the Statute of Uses. In the transfer, therefore, of equitable estates, these forms of conveyance have been dispensed with; and a mere declaration of trust in favor of another has been held sufficient to transfer to him the equitable fee. On the other hand, trust estates are, by their nature, equally incapable of the process of fines or recoveries. Yet fines are levied and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates, as they are to bar entails of legal estates. In the case of a feme inheritrix, law and equity agree in vesting the fee in the husband in her right, during their joint lives, and subject to that, in preserving it to the wife. Where the feme is possessed of personal property, the law, speaking generally, vests it absolutely in the husband, or, at least, gives him the power of acquiring the absolute property of it. Courts of

ance, but it is also liable to be disposed of by operation of law *in invitum*, like any other property; as, for example, by a general assignment under bankruptcy or insolvency, although indirectly the very purposes of the trust may thereby be defeated. Thus, where, by will, certain estates were bequeathed to trustees, in order, among other things, to pay an annuity to the testator's son of £ 500 for his natural life, the annuity being declared to be for his personal maintenance and support during his life, and not on any account to be subject or liable to the debts, engagements, charges, and encumbrances of the son; but as the same became due, it was to be paid into the son's hands, and not to any other person whatsoever, and the son became a bankrupt; it was held, that the annuity passed by the assignment under the bankruptcy to the assignees. For it was said, that the policy of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt, notwithstanding the bankruptcy. The testator might, if he had thought fit, have made the annuity determinable on the bankruptcy,¹ or have made it to go over to another person in the event of the bankruptcy. But, while it was the property of the bankrupt, it must be subject to the ordinary incidents of property, and, therefore, subject to his debts.² So, if a trust is created for a married woman for her separate use, and the trustees are to pay the money into her proper hands and for her use, her own receipt only being required, she may still assign it, and her assignee will take the full title to it.³ The same rule will apply to the case of a trust fund in rents and profits, created by a will for the benefit of a particular person

equity have, in many cases, abridged the right of the husband to the personal property of the wife, and qualified his power over it. In fixing the term for the redemption of mortgages, and in many other cases, an analogy to the term for bringing ejectments has frequently influenced the decisions of the courts. In other cases, an analogy to the term for ejectments, or the terms for bringing other writs, has not been attended to. And in some instances the courts have not considered themselves bound, even by the statutes of limitations. *Smith v. Clay*, 3 Bro. Ch. Rep. 638. But the cases where the analogy fails are not numerous; and there scarcely is a rule of law or equity of a more ancient origin, or which admits of fewer exceptions, than the rule that equity followeth the law."

¹ *Graves v. Dolphin*, 1 Sim. R. 66; *Piercy v. Roberts*, 1 Mylne & Keen, 4.

² *Brandon v. Robinson*, 18 Ves. 429, 433, 434; *Hallet v. Thomson*, 5 Paige, R. 583. [See *Rochford v. Hackman*, 10 Eng. Law & Eq. Rep. 67, where *Brandon v. Robinson* is commented upon.]

³ *Brandon v. Robinson*, 18 Ves. 434; *Post*, § 1394.

during his life, although there be a proviso that he shall not have any power to sell, or to mortgage, or to anticipate in any way the rents and profits.¹

§ 975. In regard to trusts, the analogy to estates at the common law is not only followed, as to the rights and interests of the *cestui que trust*, but also as to the remedies to enforce, preserve, and extinguish those rights and interests. Thus, for instance, there cannot, strictly speaking, be a disseisin, abatement, or intrusion, as to a trust estate. But, nevertheless, there may be such an adverse claim of a trust estate by an adverse claimant, taking the rents and profits, as may amount to an equitable ouster of the rightful claimant; and such, as if continued twenty years, would, by analogy to legal remedies, bar any assertion of his right in equity.² We have already had occasion to consider this subject in reference to statutes of limitations generally.³ And it may be here added, that bars to relief in equity from lapse of time are also entertained in courts of equity, independently of the express provisions of any statute of limitations.⁴

§ 975 *a*. In general, a trustee is only suable in equity in regard to any matters touching the trust. But, if he chooses to bind himself by a personal covenant in any such matters, he will be liable at law for a breach thereof, although he may, in the instrument containing the covenant, describe himself as covenanting as trustee; for the covenant is still operative as a personal covenant, and the superadded words are but a *descriptio personæ*.⁵ Still, however, where the matter is otherwise cognizable in equity, the mere existence of such a covenant will not deprive the courts of equity of their jurisdiction over the trust.

§ 976. It is a general rule in courts of equity, that wherever a trust exists, either by the declaration of the party, or by intentment or implication of law, and the party creating the trust has

¹ *Green v. Spicer*, 1 Russ. & Mylne, 395.

² *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1; *Id.* 191, note; *Bond v. Hopkins*, 1 Sch. & Lefr. 428, 429; *Hovenden v. Annesley*, 2 Sch. & Lefr. 630, 636; *Elmendorf v. Taylor*, 10 Wheat. R. 168 to 176; *Kane v. Bloodgood*, 7 Johns. Ch. R. 90, 113 to 128; *Prevost v. Gratz*, 6 Wheat. R. 481; *Boone v. Chiles*, 10 Peters, 177; *Shaver v. Radley*, 4 Johns. Ch. R. 310, 316.

³ *Ante*, § 55, 529, 771; *Post*, § 1520, 1521; *Prevost v. Gratz*, 6 Wheat. R. 481.

⁴ *Piatt v. Vattier*, 9 Peters, R. 405, and cases there cited; 1 Fonbl. Eq. B. 1, ch. 4, § 27, note (*q*); 1 Madd. Ch. Pr. 365; *Post*, § 1520, 1521.

⁵ *Duvall v. Craig*, 2 Wheat. R. 45.

not appointed any trustee to execute it, equity will follow the legal estate, and decree the person, in whom it is vested, (not being a *bonâ fide* purchaser for a valuable consideration without notice, or otherwise entitled to protection,) to execute the trust. For, it is a rule in equity, which admits of no exception, that a court of equity never wants a trustee.¹ This is often applied to the cases of powers of sale of lands, given by will for the payment of debts and other purposes which are in the nature of a trust. In such cases, if the power becomes extinct at law, either from no person being appointed in the will to execute it, or from the party designated dying before the execution of it, courts of equity will decree the execution of such trust, and compel the party in possession, as heir or devisee of the legal estate in the lands, to perform it.² And, generally, it may be stated, that where property has been bequeathed in trust, without the appointment of a trustee, if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee is deemed the trustee, and is bound to its due execution.³

§ 977. The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*. It is true, that he may as legal owner do acts to the prejudice of the rights of the *cestui que trust*, and he may even dispose of the estate or property, so as to bar the interests of the latter therein; as by a sale to a *bonâ fide* purchaser, for a valuable consideration without notice of the trust. But, when the alienation is purely voluntary, or where the estate devolves upon heirs, devisees, or other representatives of the trustee, or where the alienee has notice of the trust, the trust attaches to the estate, in the same manner as it did in the hands of the trustee himself, and it will be enforced accordingly in equity.⁴ And although the trustee may, by a mortgage, or other specific lien, without notice of the trust, bind the estate or the property; yet it is not bound by any judgments, or any other claims of creditors against him.⁵

¹ Co. Litt. 290 *b*, Butler's note (1); Co. Litt. 113 *a*, Butler's note (1); *Ante*, § 98; *McCartee v. Orph. Asylum Soc.* 9 Cowen, R. 437.

² Co. Litt. 113 *a*, Butler's note (1); *Id.* 290, Butler's note (1).

³ *Piatt v. Vattier*, 9 Peters, R. 405, and cases there cited; 1 Fonbl. Eq. B. 1, ch. 4, § 27, note (*q*); 1 Madd. Ch. Pr. 365.

⁴ 1 Madd. Ch. Pr. 363, 364; 2 Fonbl. Eq. B. 2, ch. 7, § 1, and note (*a*); *Pye v. George*, 1 P. Will. 129; *Saunders v. Dehew*, 2 Vern. 271.

⁵ *Ibid.* [* It was recently determined, after considerable examination of the

How far acts of forfeiture by the trustee ought to be allowed to bind the estate of the *cestui que trust*, has been a matter of considerable diversity of judgment.¹

[* § 977 *a*. It seems to be considered, that where the trustee holds the legal title in trust property, with the power to convert the same into money and apply the money to the purposes of the trust, a *bond fide* purchaser will hold the property free from all trust. In order to enable the *cestui que trust* to follow the same into the hands of an assignee from the trustee, it must appear either that no consideration was paid or else that the assignee knew that the trustee was misapplying the trust estate and took the conveyance in aid of such misapplication. It is not enough that one who advances money, on the pledge of the trust estate, knew it was of that character, if he had no reason to doubt the right of the trustee so to use it.²]

§ 978. What powers may be properly exercised over trust property, by a trustee, depends upon the nature of the trust, and sometimes upon the character and situation of the *cestui que trust*. Where the *cestui que trust* is of age, or *sui juris*, the trustee has no right (unless express power is given) to change the nature of the estate, as by converting land into money, or money into land, so as to bind the *cestui que trust*. But where the *cestui que trust* is not of age, or *sui juris*, it is frequently necessary to his interests that the trustee should possess the power; and in case his interests require the conversion, the acts of the trustee, *bond fide* done for such a purpose, seem to be justifiable.³

§ 979. It has, also, been laid down, as a general rule, that the *cestui que trust* may call upon the trustee for a conveyance to execute the trust; ⁴ and that, what the trustee may be compelled to do by a suit, he may voluntarily do without a suit. But this rule admits, if it does not require, many qualifications in its practical application; for, otherwise, a trustee may incur many perils, the true nature and extent of which may not be ascertainable, until there has been a positive decision upon his acts by a court of

authorities, that creditors levying upon lands held by the debtor in trust, but without notice to the creditors, acquired no title against the *cestui que trust*. Hart, Leslie, and Warren *v. Farmers' and Mechanics' Bank*, 33 Vt. R. 252.]

¹ 1 Madd. Ch. Pr. 363, 364; 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (a).

² [* Ashton *v. Atlantic Bank*, 3 Allen, 217.]

³ 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (a).

⁴ See Jervoise *v. Duke of Northumberland*, 1 Jac. & Walk. 559, 571.

equity, or a positive declaration by such a court of the acts, which he is at liberty to do.¹

§ 979 a. Courts of equity carry trusts into effect only when they are of a certain and definite character. If, therefore, a trust be clearly created in a party, but the terms by which it is created are so vague and indefinite that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general funds of the author of the trust. Thus, for example, where a lady in her lifetime indorsed a promissory note of £ 2000, and sent it to another lady in a letter, whereby she gave it to the latter for her sole use and benefit, for the express purpose of enabling her to present to either branch of the testatrix's family any portion of the principal or interest thereon, as she might deem the most prudent; and in the event of her death empowering her to dispose of the same by will or deed to those, or either branch of her family she might consider most deserving thereof; and stating, that the indorsement was made to enable her to have the sole use and power thereof; it was held, that the letter created a trust, the objects of which were too indefinite to enable the court to execute it; and that, therefore, the £ 2000 formed a part of the donor's personal estate.² It was clear in this case, that the donee could not take to her own sole use, for there was a superadded trust showing that not to be the intention of the donor; and therefore, the property reverted to the donor, as it would upon the failure of any ordinary trust.³

§ 979 b. So, where a testatrix bequeathed the residue of her estate to her executors "upon trust to dispose of the same at such times and in such manner, and for such use and purposes, as they shall think fit, it being my will that the distribution thereof shall be left to their discretion"; it was held to be a trust in the executors of such a vague and uncertain nature, that it could not be executed by a court of equity, and it was therefore void; and the

¹ See Mr. Fonblanque's note (c), 2 Fonbl. Eq. B. 2, ch. 7, § 2; *Moody v. Walters*, 16 Ves. 302, 303, 307 to 314.

² *Stubbs v. Sargon*, 2 Keen, R. 255; *Ommanney v. Butcher*, 1 Turn. & Russ. 260, 270, 271; *Wheeler v. Smith*, 9 How. U. S. C. 79.

³ *Post*, § 1071 to 1073, 1156, 1183, 1197 a. See *Wood v. Cox*, 2 M. & Craig, 684; S. C. 1 Keen, R. 317.

residuary estate so bequeathed was decreed to belong to the next of kin of the testatrix.¹

§ 980. Express trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will. Not that, in those cases, the language of the instrument need point out the nature, character, and limitations of the trust in direct terms, *ipsissimis verbis*; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used; and the trust can be drawn, as it were *ex visceribus verborum*.² Implied trusts are those which are deducible from the nature of the transaction, as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law, as matter of equity, independent of the particular intention of the parties, sometimes called resulting or constructive trusts.

§ 981. The most usual cases of express trusts are found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of lands; or in formal conveyances, such as marriage settlements, terms for years, mortgages, and other conveyances and assignments for the payment of debts, or for raising portions, or for other special purposes; or in last wills and testaments, in a variety of bequests and devises, involving fiduciary interests for private benefit or public charity. Indeed, many of these instruments (as we shall abundantly see) will also be found to contain implied, constructive, and resulting trusts; and the separate consideration of them throughout would, therefore, be scarcely attainable, without frequent repetitions of the same matters as well as of the same illustrations.

[* § 982. We cannot go minutely into the subject of particular trusts. Numerous implied trusts arise out of express trusts. We shall not hereafter attempt to discriminate nicely between the two classes of trusts, unless where perspicuity seems to require it.]

¹ *Fowler v. Garlike*, 1 Russ. & Mylne, 232; *Wheeler v. Smith*, 9 How. U. S. C. 79.

² *Fisher v. Fields*, 10 Johns. R. 494.

CHAPTER XXV.

MARRIAGE SETTLEMENTS.

[* § 983. Marriage settlements construed strictly, but marriage articles more liberally.

§ 984. Equity will construe executory trusts, under marriage settlements, more favorably to the issue, than those under wills.

§ 985. Will construe contract, as mere articles of settlement in favor of the issue.

§ 986, 987. Will not generally decree specific execution of articles at suit of volunteer.

§ 987 *a*. How far a marriage settlement made after marriage is good against creditors.

§ 988. Personal chattels and terms for years may be settled like real estate held in fee.

§ 989. Estates *pur autre vie* partake of the incidents of estates tail.

§ 990. Executory devises of terms and chattels. Remote limitations void.

§ 991. Limitations to preserve contingent remainders.

§ 992. This effected by means of special trusts.

§ 993. Courts of equity will aid such trustees in preserving the inheritance.

§ 994. Will compel the execution of such trusts.

§ 995. Will sometimes compel trustee to join in conveyance, to defeat the remainder.

§ 996. Courts of equity will not control the discretion of a trustee.

§ 997. Difficulty of determining when they should join.]

§ 983. AND, in the first place, in regard to MARRIAGE SETTLEMENTS. Where an instrument, designed as a marriage settlement, is final in its character, and the nature and extent of the trust estates created thereby are clearly ascertained and accurately defined, so that nothing further remains to be done according to the intention of the parties, there the trusts will be treated as executed trusts, and courts of equity will construe them in the same way as legal estates of the like nature would be construed at law upon the same language.¹ Thus, if the language of the instrument would give a fee tail to the parents in a legal estate, they will be held entitled to a fee tail in the trust estate. But where no marriage settlement has actually been executed, but mere marriage articles only for a settlement, there, courts of equity, when called upon to execute them, will

¹ 1 Fonbl. Eq. B. 1, ch. 6, § 7, and note (*n*); Id. § 8, note (*s*); 2 Fonbl. Eq. B. 2, ch. 1, § 5, note (*k*); Fearne on Conting. Rem. by Butler, p. 145 to 148 (7th edit.); Id. p. 133 to 136; 1 Madd. Ch. Pr. 360; *Synge v. Hales*, 2 B. & Beatt. 507; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559, 571; 4 Kent, Comm. Lect. 61, p. 302 (2d edit.).

indulge in a wider latitude of interpretation, and will construe the words, according to the presumed intention of the parties, most beneficially for the issue of the marriage. In executing such articles they will put it out of the power of the parents to defeat the issue, by requiring that the limitations in the marriage settlement should be what are called limitations in strict settlement; that is to say, instead of giving the parents a fee tail, the limitations will be made to them for life, with remainders to the first and other sons, &c., in the fee tail; and if the articles are applicable to daughters, the like limitations will be made to them also.¹ And in cases of executory trusts arising under wills, a similar favorable construction will be made in favor of the issue in carrying them into effect, if the court can clearly see from the terms of the will that the intention of the testator is to protect the interests of the issue in the same way.²

§ 984. There is, however, a distinction recognized in equity between executory trusts created under marriage articles, and those created under wills, in relation to the interpretation of them and

¹ 1 Fonbl. Eq. B. 1, ch. 6, § 7, and note (n); Id. § 8, note (s); Fearne on Conting. Rem. p. 90 to 114, by Butler (7th edit.); Earl of Stamford v. Hobart, 1 Bro. Parl. Cas. 288; Glenorchy v. Bosville, Cas. Temp. Talb. 3. See 1 White & Tudor's Eq. Leading Cases, 1, and notes; Countess of Lincoln v. Duke of Newcastle, 12 Ves. 218, 227; Taggart v. Taggart, 1 Sch. & Lefr. 87. There is a most elaborate note of Mr. Fonblanque (1 Fonbl. Eq. B. 1, ch. 6, § 8, note s), on this subject, in which the distinction between trusts executed and trusts executory is fully discussed, and the distinction stated in the text is firmly maintained. I regret that it is too long for an insertion in this place. See also Atherly on Marriage Settlement, ch. 7, p. 93 to 105. Lord Eldon, in Jervoise v. Duke of Northumberland (1 Jac. & Walk. 559, 571), has taken notice of the confused and inaccurate senses in which the words *executory trusts* and *executed trusts* are often used. In one sense all trusts are executory, since the *cestui que trust* may call for a conveyance and execution of the trust. But executory trusts are properly those where something remains to be done to complete the intention of the parties, and their act is not final. See Mott v. Buxton, 7 Ves. 201; Hopkins v. Hopkins, 1 Atk. 591. [* This last case is here incorrectly reported, and is corrected by Lord Hardwicke's manuscript notes, in Habbergham v. Vincent, 2 Vesey, Jr. 238.]

² Leonard v. Earl of Sussex, 2 Vern. 526; Papillon v. Voice, 2 P. Will. 478; Glenorchy v. Bosville, Cas. Temp. Talb. 3; 1 Fonbl. Eq. B. 1, ch. 6, § 8, and note (s); Countess of Lincoln v. Duke of Newcastle, 12 Ves. 227, 230, 231, 234; Fearne on Cont. Rem. by Butler, p. 113 to 148 (7th edit.); Id. p. 184; Green v. Stephens, 17 Ves. 75, 76; Carter v. White, Ambler, R. 670; Sydney v. Shelley, 19 Ves. 366; Stonor v. Curwen, 5 Sim. R. 264.

the mode of carrying them into execution. In cases of marriage articles, courts of equity will, from the nature of the instrument, presume it to be intended for the protection and support to the interests of the issue of the marriage, and will, therefore, direct the articles to be executed in strict settlement, unless the contrary purpose clearly appear.¹ For, otherwise, it would be in the power of the father to defeat the purpose of protecting and supporting such interests, and to appropriate the estate to himself. But, in executory trusts under wills, all the parties take from the mere bounty of the testator; and there is no presumption that the testator means one quantity of interest rather than another, an estate for life in the parent rather than an estate tail; for he has a right arbitrarily to give what estate he thinks fit, to the parent, or to the issue.² If, therefore, the words of marriage articles limit an estate for life to the father, with remainder to the heirs of his body, courts of equity will decree a strict settlement, in conformity to the presumed intention of the parties. But if the like words occur in executory trusts created by a will, there is no ground for courts of equity to decree the execution of them in strict settlement, unless other words occur explanatory of the intent. The subject being a mere bounty, the intended extent of the bounty can be known only from the words in which it is conferred. If it is clearly ascertained from anything in the will, that the testator did not mean to use the expressions which he has employed, in a technical sense, courts of equity, decreeing such a settlement as he has directed, will depart from his words in order to execute his intention. But they will follow his words, unless he has himself shown that he did not mean to use them in their proper sense; and they have never said that, merely because the direction was for an entail, they could execute that by decreeing a strict settlement.³

¹ Atherly on Marr. Settlem. ch. 7, p. 93 to 101; *Ante*, § 974.

² 1 Fonbl. Eq. B. 1, ch. 6, § 8; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 32; Id. B. 3, Pt. 2, ch. 2, p. 379; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 550, 551, 554.

³ *Blackburn v. Stables*, 2 Ves. & B. 370; *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559, 571, 574; *Lord Deerpur v. Duke of St. Albans*, 5 Madd. R. 260; *Synge v. Hales*, 2 B. & Beatt. There is some language of Lord Eldon in the *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227 to 230, which might lead to the conclusion that he held that there was no distinction between executory trusts under marriage articles and those created by a will. In that

§ 985. In furtherance of the same beneficial purpose in favor of issue, courts of equity will construe an instrument which might, under one aspect, be treated as susceptible of a complete operation at law, to contain merely executory marriage articles, if such an intent is apparent on the face of it; for this construction may be most important to the rights and interests of the issue.¹ So an instrument, as to one part of the property comprised in it, may be construed to be a final legal marriage settlement; and as to other property merely to be executory marriage articles.²

§ 986. There is also a distinction in courts of equity as to the parties, in whose favor the provisions of marriage articles will be specifically executed, or not.³ The parties seeking a specific execution of such articles may be those who are strictly within the reach and influence of the consideration of the marriage, or claiming through them; such as the wife and issue, and those claiming under them; or they may be mere volunteers, for whom the settler is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles; such as his distant heirs or relatives, or mere strangers. Now, the distinction is, that marriage articles will be specifically executed upon the application of any persons within the scope of the consideration of the marriage, or claiming under such person; but not generally upon the application of mere volunteers.⁴ But where the bill is brought by persons

case, he said: "There is no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles,—such a distinction would shake to their foundation the rules of equity. But in *Jervoise v. Duke of Northumberland* (1 Jac. & Walk. 573), he corrected the misapprehension of his opinion, and said: "If it is supposed that I said there was no difference between marriage articles and executory trusts, and that they stood precisely on the same ground, I never meant to say so. In marriage articles, the object of such settlement, the issue to be provided for, the intention to provide for such issue, and, in short, all the considerations that belong peculiarly to them, afford *primâ facie* evidence of intent, which does not belong to executory trusts under wills."

¹ *Atherly on Marr. Sett.* ch. 7, p. 121 to 133; *Trevor v. Trevor*, 1 P. Will. 622; *White v. Thornborough*, 2 Vern. 702. See 1 *White & Tudor's Eq. Lead. Cas.* 30, and notes.

² *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218; *Vaughan v. Burslem*, 3 Bro. Ch. 101, 106.

³ See *Neves v. Scott*, 9 Howard, U. S. 197; *Dennison v. Gothring*, 7 Barr, 175; *King v. Whitely*, 10 Paige, 465.

⁴ See *Atherly on Marr. Sett.* ch. 5, p. 131 to 145; *Ante*, § 433, 706 a, 793 a,

who are within the scope of the marriage consideration, or claiming under them, there, courts of equity will decree a specific execution throughout, as well in favor of the mere volunteers, as of the plaintiffs in the suit. So that, indirectly, mere volunteers may obtain the full benefit of the articles, in the cases where they could not directly insist upon such rights. The ground of this peculiarity is, that, when courts of equity execute such articles at all they execute them *in toto*, and not partially.¹

§ 987. It has been already stated, that, generally, marriage articles will not be decreed in favor of mere volunteers.² But an exception seems formerly to have been entertained in favor of a wife and children, claiming as volunteers, (such as a wife and children under a subsequent marriage, or under a voluntary

973; *Post*, § 1040. [*Hence, where the parties in contemplation of marriage agreed that neither, after the death of one of them, should claim anything that belonged to the other before marriage, it was held sufficient to bar the woman's right of dower, and a year's provision and distributive share in her husband's estate. *Cauley v. Lawson*, 5 Jones, Eq. R. 132.]

¹ *Atherly on Marr. Sett.* ch. 5, p. 125 to 130; *Id.* 131 to 135; *Osgood v. Strode*, 2 P. Will. 255, 256; *Trevor v. Trevor*, 1 P. Will. 622; *Goring v. Nash*, 3 Atk. 186, 190.

² *Ante*, § 95, 169, 433, 706 a, 793, 793 a; *West v. Erissey*, 2 P. Will. 349; *Kettleby v. Atwood*, 1 Vern. 298, 471; *Stevens v. Trueman*, 1 Ves. 73; *Williamson v. Codrington*, 1 Ves. 512, 516; *Colman v. Sarrel*, 1 Ves. Jr. 50; *S. C.* 3 Bro. Ch. R. 13; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Ellison v. Ellison*, 6 Ves. 662; *Graham v. Graham*, 1 Ves. Jr. 275; *Wycherley v. Wycherley*, 2 Eden, R. 177, and note; *Bunn v. Winthrop*, 1 Johns. Ch. R. 336, 337. This seems to be the general rule. But there are cases not easily reconcilable with it. See *Vernon v. Vernon*, 2 P. Will. 594; *Williamson v. Codrington*, 1 Ves. 512, 514; *Stevens v. Trueman*, 1 Ves. 73; 1 Madd. Ch. Pr. 326, 328; 1 Fonbl. Eq. B. 1, ch. 1, § 7, notes (v), (x); *Id.* ch. 5, § 2, note (h); 2 Fonbl. B. 2, ch. 5, § 2, and note (i). Lord Eldon, in *Ellison v. Ellison*, 6 Ves. 662, has stated the general doctrine in equity to be, that voluntary trusts, executed by a conveyance, will be held valid, and enforced in equity. But if the trust is executory, and rests merely in covenant, it will not be executed. The exception in favor of meritorious claimants, such as a wife or children, is admitted by the same learned judge, in *Pulvertoft v. Pulvertoft*, 18 Ves. 99. Mr. Chancellor Kent, in *Bunn v. Winthrop*, 1 Johns. Ch. R. 336, 337, has examined many of the cases, and adopted Lord Eldon's conclusion. With respect to chattel interests, he maintains, that an agreement under seal imports a consideration at law; and that, therefore, a bond, though voluntary and without consideration, will support a decree for executing the trust; relying on *Lechmere v. Earl of Carlisle*, 3 P. Will. 222, and *Beard v. Nuthall*, 1 Vern. 427; *Ante*, § 973, 979 a; *Walwyn v. Coutts*, 3 Meriv. R. 708. See, also, *Minturn v. Seymour*, 4 Johns. Ch. R. 500. *Antrobus v. Smith*, 12 Ves. 44 to 46, and *Colman v. Sarrell*, 1 Ves. Jr. 54, seem contra.

contract made before or after marriage, and not in consideration thereof,) upon the ground that the settler is under a natural and moral obligation to provide for them,¹ upon the same principle which has been applied in favor of a wife and children in cases of a defective execution of powers.² But against what persons courts of equity ought, in favor of a wife or children, to interfere, was a point which was thought to admit of more question. It was said, that they ought to interfere to enforce the specific execution of such voluntary contracts or voluntary articles, against the heir at law of the voluntary settler, unless, perhaps, where he was a son wholly unprovided for. But, whether they ought to interfere against the settler himself in such a case, was a matter upon which there was more diversity of opinion and judgment. However, the whole doctrine seems now overthrown; and the general principle is established, that in no case whatsoever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child.³

[* § 987 *a*. But where the parent, or his agent, or any friend and patron of the woman holds out considerations of a pecuniary nature to induce the marriage and a settlement upon the lady, in faith of which the marriage and settlement take place, a court of equity will compel the party holding out such inducements to make them good.⁴ And it has been held that a settlement, after marriage, of the wife's property, reciting a parol agreement, before marriage, to make such settlement, is valid against the creditors of the husband.⁵ But in a very late case before the Lord Chancellor, Cranworth, on appeal from the Master of the Rolls, where the husband and wife, in contemplation of marriage,

¹ *Atherly on Marriage Sett.* ch. 5, p. 131 to 139; *Osgood v. Strode*, 2 P. Will. 245; *Ithill v. Beane*, 1 Ves. 216; *Roe v. Mitton*, 2 Wils. R. 356; *Goring v. Nash*, 3 Atk. 186; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Ellison v. Ellison*, 6 Ves. 662; *Ante*, § 433, 706 *a*, 787, 793 *a*, 973; *Ellis v. Nimmo*, 1 Lloyd & Goold, R. 333. But see *Holloway v. Headington*, 8 Sim. R. 324, 325; *Jefferys v. Jefferys*, 1 Craig & Phillips, 138, 141; *Moore v. Crofton*, 3 Jones & Lat. 438.

² *Ante*, § 95, 169, 170, and note.

³ *Holloway v. Headington*, 8 Simons, R. 325; *Jefferys v. Jefferys*, 1 Craig & Phillips, 138, 141; *Ante*, § 433, 706, 706 *a*, 787, 793, 793 *b*, 973; *Post*, § 1040 *a*.

⁴ [* *Hammersley v. Baron De Biel*, 12 Cl. & Fin. 45. This subject is very learnedly discussed by the Law Lords, who gave opinions in this case.

⁵ *Dundas v. Dutens*, 2 Cox, 235.

agreed upon the settlement of her property, upon herself and children, and went to a solicitor for that purpose, who being unable to complete it before the time fixed for the marriage, the husband told her it would be equally valid if executed subsequent to the marriage, which he promised to do, and did execute a settlement in conformity to their agreement, shortly after the marriage had taken place, in confidence of the foregoing assurances; it was held that the settlement was fraudulent and void as against creditors, being voluntary on the part of the husband, the wife having no equity as against her husband's creditors.¹ We do not purpose to review the cases upon this subject at the present time. But it is obvious that this last case of *Warden v. Jones* trenches very essentially upon the principle of some of the earlier cases. It had always been considered that the wife, so long as her property was kept separate, and especially where this was done in pursuance of an ante-nuptial parol agreement, between herself and her husband, which had been reduced to writing subsequent to the marriage, had an equity which the courts of equity would protect against the creditors of the husband.² It seems very idle, not to say frivolous, to attempt any distinction between the case where the settlement recites the parol agreement, and where it is made in fulfilment of such contract, but without reciting it, as is suggested in *Warden v. Jones*. It seems to be admitted here, that, if the husband were guilty of an intentional deception in the matter, a court of equity might interfere on behalf of the wife. But if the husband refuse to perform his promise after receiving the price of it, it is much the same as if he had originally made it with that purpose. And once having performed it, one would naturally expect the wife to have the

¹ *Warden v. Jones*, 2 De G. & J. 76. See, also, *Spurgeon v. Collier*, 1 Eden, 61; *Lassence v. Tierney*, 1 Mac. & G. 551; *Randall v. Morgan*, 12 Ves. 73; *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Jordan v. Money*, 5 H. Lords Cas. 185; *Page v. Horne*, 11 Beavan, 227; *Kinderley v. Jervis*, 22 Beavan, 1; *Wildman v. Wildman*, 9 Vesey, 174; *Ryland v. Smith*, 1 My. & Cr. 53; *Battersbee v. Farrington*, 1 Swanst. 106; *Lavender v. Blackstone*, 2 Lev. 146; *Ante*, § 374, and notes.

² *Merrill's Administrator v. Merrill's Heirs*, 32 Vermont, R. 27; see also *Caldwell v. Renfrew*, 33 Vt. R. 213. The case of *Warden v. Jones* is questioned in England, and was, we believe, decided against sound legal principle, as we are sure it was against the instinctive sense of justice. See *London Jurist*, Feb. 12, 1859. See, also, *Barkworth v. Young*, 3 Jur. N. S. 34, pt. 1. But see *Turner v. Nye*, 7 Allen, 176; *Croft v. Wilbar*, 7 Allen, 248.

benefit of the contract, unless the delay had given the husband false credit. But where, in negotiations between the husband and the father of his intended wife, in contemplation of marriage, the father gives assurance that "all we possess will be divided, at our decease, equally among our children," it was held to be subject to the daughter surviving him and his wife.^{1]}

§ 988. In regard to terms for years and personal chattels, it may be observed, that they are capable of being limited in equity in strict settlement, in the same way, and to the same extent, as real estate of inheritance may be; so as to be transmissible, like heirlooms.² The statute *de donis* does not extend to entail of anything, except real estates of inheritance. But, nevertheless, estates *pour autre vie*, and terms of years, and personal chattels are now held to be susceptible of being settled in tail, and rendered unalienable almost for as long a time as if they were strictly entailable.

§ 989. In regard to estates *pour autre vie*, they may, at law, be devised or limited in strict settlement by way of remainder, like estates of inheritance; and the remainder-man will take as special occupant.³ But those, who have an interest therein in the nature of estates tail, may bar their issue, and all remainders over, by the alienation of the estate *pour autre vie*; as those who are, strictly

¹ Loxley v. Heath, 6 Jur. N. S. 262. See, also, Prole v. Soady, 5 Jur. N. S. 1382.]

² Atherly on Marr. Sett. ch. 5, § 121 to 139; Goring v. Nash, 3 Atk. 185; S. C. cited 1 Ves. 513; *Ante*, § 433. I content myself with referring to Mr. Atherly's examination of this subject, in his work on Marriage Settlements (ch. 5, p. 131 to 145), and Lewin on Trusts (ch. 9, p. 110 to 137), where, indeed, the authorities cited may be thought to afford some grounds for doubt and further consideration. Co. Litt. 18 *b*, note (7), by Hargrave; Co. Litt. 20 *a*, note (5), by Hargrave; 1 Madd. Ch. Pr. 367; 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*d*); 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*f*). In the case of Ellis v. Nimmo (1 Lloyd & Gould, R. 333), the subject was discussed at large by Lord Chancellor Sugden, who affirmed the doctrine, that a post-nuptial agreement, making provision for a child, ought to be enforced in equity against the settler, as being grounded on a meritorious consideration. But in Holloway v. Headington, 8 Sim. R. 325, the Vice-Chancellor (Sir L. Shadwell) expressed some doubt upon the case of Ellis v. Nimmo, and the case has since been shaken, and seems overthrown by the case of Jefferys v. Jefferys, 1 Craig & Phillips, 138, 141. See Moore v. Crofton, 3 Jones & Lat. 438.

³ Low v. Burron, 3 P. Will. 262, and Mr. Cox's notes; Fearne on Conting. Rem. by Butler, p. 493 to 499 (7th edit.); Doe d. Blake v. Luxton, 6 Term Rep. 291, 292; Finch v. Tucker, 2 Vern. 184; Baker v. Bayley, 2 Vern. 225.

speaking, tenants in tail of legal estates, may do by fine and recovery.¹

§ 990. In regard to estates in terms of years and personal chattels, the manner of settling them is different; for in them no remainder can at law be limited. But they may be entailed at law by an executory devise, or by a deed of trust in equity, as effectually as estates of inheritance, and with the same limitations as to perpetuity.² However, the vesting of an interest in a term for years or in chattels in any person, equivalent to a tenancy in tail, confers upon such person the absolute property in such term or chattels, and bars the issue, and all subsequent limitations, as effectually as a fine and recovery would do in cases of pure entails, or as an alienation would do in the case of conditional fees, and estates *pour autre vie*.³ If, in the case of a term of years, or of chattels, the limitations over are too remote, the whole property vests in the first taker.⁴

§ 991. In marriage settlements it is that we principally find limitations made to trustees to preserve contingent remainders. Trusts of this sort arose out of the doctrine in Chudleigh's case,⁵ and Archer's case,⁶ although it is said, that they were not put in practice until the time of the Usurpation.⁷ The object of these limitations is to prevent the destruction of contingent remainders by the tenant for life, or other party, before the remainder comes *in esse*, and is vested in the remainder-man. The great dispute in Chudleigh's case was concerning the power of feoffees to uses,

¹ Co. Litt. 20 *a*, note (5); Fearne on Conting. Rem. by Butler, p. 493 to 499 (7th edit.); 2 Black. Comm. 113, 259, 260; Wastneys *v.* Chappell, 1 Bro. Parl. R. 475; Norton *v.* Frecker, 1 Atk. 525; Low *v.* Burron, 3 P. Will. 262, and Mr. Cox's notes; Gray *v.* Mannock, 2 Eden, R. 339; Blake *v.* Luxton, Cooper, R. 178, 184 to 186; Forster *v.* Forster, 2 Atk. 260.

² *Ante*, § 844, and note, § 845; 1 Fonbl. Eq. B. 1, ch. 4, § 2, and note (*f*); 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*d*); Wright *v.* Cartwright, 1 Burr. 282, 284.

³ Co. Litt. 18 *b*, Hargrave's note (7); Co. Litt. 20 *a*, Hargrave's note (5); Matthew Manning's case, 8 Co. R. 94, 95; Lampet's case, 10 Co. R. 47; Fearne on Conting. Rem. by Butler, 402, 403 (7th edit.); 1 Madd. Ch. Pr. 367; Goodright *v.* Parker, 1 M. & Selw. 692; 2 Kent, Comm. Lect. 35, p. 352 (3d edit.); 2 Fonbl. B. 2, ch. 4, § 2, note (*d*).

⁴ Co. Litt. 20 *a*, Harg. note (5); 1 Madd. Ch. Pr. 367.

⁵ 1 Co. R. 120.

⁶ 1 Co. R. 66.

⁷ Per Lord Hardwicke, in Garth *v.* Cotton, 1 Dick. R. 191; S. C. 1 Ves. 555; 3 Atk. 751; Fearne on Conting. Rem. by Butler, 325, 326 (7th edit.).

created since the Statute of Uses of 27 Henry VIII. ch. 10, to destroy contingent uses by fine or feoffment before the contingent uses came into being. It was determined, that the feoffees possessed such a power; and also, that they had in them a possibility of seisin to serve such contingent uses when they came into being, and a *scintilla juris*, or power of entry, in case their estate was divested, to restore that possibility. At this time it had not been decided that the destruction of the particular estate for life, by the feoffment or other conveyance of the *cestui que use* for life, before the contingent remainder became vested, was a destruction of the contingent remainder. But that point was settled in the affirmative a few years afterwards in Archer's case.¹

§ 992. There being then at law, under these determinations, a power in the general feoffees to uses, either to preserve or to destroy these contingent uses *ad libitum*, and also a power in the *cestui que use* for life also to destroy them, there arose a necessity to remedy these defects. And it was done by vesting a limitation in certain trustees, *eo nomine*, upon an express trust to preserve such contingent remainders. So that thereby the whole inheritance might come entire to the *cestui que use* in contingency, in like manner as trustees to uses ought to have preserved them before the Statute of Uses, when they were but trusts to be executed by courts of equity.²

§ 993. It was at first a question, whether upon such a limitation to trustees, after a prior limitation for life, they took any estate in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death. But it was settled, that the trustees had the immediate freehold in them, as an estate *pour autre vie*; and that at law they could maintain and defend any action respecting the freehold.³ Upon this ground it is that such trustees are entitled to an injunction in equity to prevent waste in the lands, and in mines, and timber thereon; as these constitute a valuable, and sometimes the most valuable, portion of the inheritance, which the trustees are bound to preserve. In short, as has been observed by Lord Hard-

¹ Ibid.; Fearne on Conting. Rem. by Butler, 290, and note (*h*); Id. 291 to 300; Chudleigh's case, 1 Co. R. 120; Archer's case, 1 Co. R. 66.

² Garth v. Cotton, 1 Dick. R. 194.

³ Ibid.; Duncomb v. Duncomb, 3 Lev. 437; Fearne on Cont. Rem. by Butler, 326 (7th edit.).

wicke, the duty of such trustees being to preserve the inheritance, every assistance will be granted by courts of equity in support of their trusts, and to aid them in its due accomplishment.¹

§ 994. On the other hand, courts of equity will treat, as a distinct breach of trust, every act of such trustees inconsistent with their proper duty, and will give relief to the parties injured by such misconduct.² If, therefore, they should, in violation of their trust, join in any conveyance to destroy the contingent uses or remainders, they will be held responsible therefor. If the persons, taking under such conveyance, are volunteers, or have notice of the trust, they will be held liable to the same trusts, and decreed to restore the estate. If they are purchasers without notice, then the lands are, indeed, discharged of the trust; but the trustees themselves will be held liable for the breach in equity, and will be decreed to purchase lands with their own money, equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by them.³

§ 995. But it is not every case, in which trustees have joined in a conveyance to destroy contingent remainders, that they will be deemed guilty of a breach of trust.⁴ In some cases courts of equity will even compel them to join in conveyances, which may affect or destroy such remainders. And, in such cases, it has been supposed that what they may be compelled to do by suit, if voluntarily done, will not be deemed a breach of trust.⁵ But the cases, in which courts of equity will compel trustees to join in such conveyances, are (as has been correctly said) rare. They have happened under peculiar circumstances; either of pressure to discharge incumbrances, prior to the settlement; or in favor of creditors, where the settlement was voluntary; or for the advantage of persons, who were the first objects of the settlement; as,

¹ *Garth v. Cotton*, 1 Dick. 195 to 197, 205, 208, 219; *Eden on Injunction*, ch. 9, p. 167, 168; 1 Madd. Ch. Pr. 395 to 397; *Stansfield v. Harbergham*, 10 Ves. 278.

² *Garth v. Cotton*, 1 Dick. 199.

³ *Garth v. Cotton*, 1 Dick. R. 199, 200 to 202, 205, 208, 219; *Pye v. Georges*, Prec. Ch. 308; S. C. 1 P. Will. 128; *Mansel v. Mansel*, 2 P. Will. 680 to 685; *Fearnie on Conting. Rem. by Butler*, 326, 327 (7th edit.); 1 Madd. Ch. Pr. 393, 394.

⁴ *Moody v. Walters*, 16 Ves. 302, 303, 307 to 314.

⁵ *Moody v. Walters*, 16 Ves. 310.

for example, to enable the first son to make a settlement upon an advantageous marriage.¹

§ 996. There is no question, however, that the trustees may join with the *cestui que trust* in tail in any conveyance to bar the entail; for that is no breach of trust, but precisely what they may be compelled to do; although the *cestui que trust* himself might have barred such entail without their joining in it.² But there is a great distinction between cases where courts of equity will compel trustees to join in a conveyance to destroy contingent remainders, and cases where they will decree them to be guilty of a breach of trust for such an act, when it is voluntarily done by them. Thus, for example, courts of equity will not punish trustees, as guilty of a breach of trust, for joining in a conveyance of the *cestui que trust* in tail, to bar the entail. And yet it is equally clear, that they will not compel them to join in such conveyance.³ The ground of this distinction is, that trustees to support contingent remainders are considered as honorary trustees for the benefit of the family; and the interests of mankind require them to be treated as such by all courts of justice. And unless a violation of their trust appears, courts of equity ought not to take away all their discretion; or to direct them not to join in any conveyance without the order of such a court, although the trustees may be of opinion that the interests of the family require it. The effect of such a doctrine would be to make the courts of equity the trustees of all the estates in the country.⁴

§ 997. It is not a little difficult to ascertain from the authorities

¹ Fearne on Conting. Rem. by Butler, 331 to 337, and the cases there cited; 1 Madd. Ch. Pr. 394, 395; *Moody v. Walters*, 16 Ves. 301 to 314, and cases there cited.

² Fearne on Conting. Rem. by Butler, 133; 1 Eq. Abridg. 384, E. 1, note; *Robinson v. Comyns*, Cas. Temp. Talb. 166; *Boteler v. Alington*, 1 Bro. Ch. R. 72, and Belt's note (5); *Marwood v. Turner*, 3 P. Will. 165, 171; *Biscoe v. Perkins*, 1 Ves. & B. 485.

³ *Moody v. Walters*, 16 Ves. 301 to 314; *Biscoe v. Perkins*, 1 V. & Beam. 491; *Woodhouse v. Hoskins*, 3 Atk. 22; S. C. cited 16 Ves. 308; *Barnard v. Large*, 1 Bro. Ch. R. 534; *Osborne v. Bury*, 1 B. & Beatt. 58.

⁴ *Moody v. Walters*, 16 Ves. 310, 311; *Biscoe v. Perkins*, 1 Ves. & Beam. 391. Lord Hardwicke, in *Potter v. Chapman* (Ambler, R. 99), said, that if a trust is personal, and has not been corruptly exercised, courts of equity will not interpose. This remark is applicable, not to cases like those of trustees to preserve contingent remainders, but to trusts purely personal, and in the discretion of the trustee, as to their exercise.

the true nature and extent of the duties and liabilities of trustees to preserve contingent remainders; and in what cases they may or ought to join in conveyances to destroy them or not. Lord Eldon has expressed himself unable to deduce the true principle from them. His language is: "The cases are uniform to this extent; that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable to a breach of trust; and so is every purchaser under them with notice. But when we come to the situation of trustees to preserve remainders, who have joined in a recovery after the first tenant in tail is of age, it is difficult to say more, than that no judge in equity has gone the length of holding that he would punish them as for a breach of trust; even in a case where they would not have been directed to join. The result is, that they seem to have laid down, as the safest rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for the trustees never to destroy the remainders, even if the tenant in tail concurs without the direction of the court. The next consideration is, in what cases the court will direct them to join. And, if I am governed by what my predecessors have done, and refused to do, I cannot collect, in what cases trustees would or would not be directed to join; as it requires more abilities than I possess to reconcile the different cases with reference to that question. They all, however, agree, that these trustees are honorary trustees; that they cannot be compelled to join; and all the judges protect themselves from saying, that if they had joined, they should be punished; always assuming that the tenant in tail must be twenty-one."¹

¹ *Biscoe v. Perkins*, 1 V. & Beam. 491, 492.

CHAPTER XXVI.

TERMS FOR YEARS.

[* § 998. Equity subjects terms attendant upon the inheritance to the law of the inheritance.

§ 999. These attendant terms will protect equities and exclude counter-equities.

§ 1000. But will do this only in favor of one having equal equity.

§ 1001. When the term is merged in the inheritance.

§ 1002. Distinction between terms attendant and in gross.

§ 1003. Portions raised by terms a primary charge on realty.]

§ 998. In the next place, in regard to TERMS FOR YEARS, whereby trusts are created to subserve the special objects of the parties. The creation of long terms for years, for the purpose of securing money, lent on mortgage of the land, took its rise from the inconveniences of the ancient way of making mortgages in fee by way of feoffment and other solemn conveyances, with a condition of defeasance. For, by such mode, if the condition was not punctually performed, the estate of the mortgagee at law became absolute, and was subject to incumbrances made by him; and even (as some thought) to the dower of his wife. Hence it became usual to create long terms of years upon the like condition; because, among other reasons, such terms on the death of the mortgagee became vested in his personal representatives, who were also entitled to the debt, and could properly discharge it.¹ But, as this subject will be more fully considered hereafter,² it is only necessary to say in this place, that, by analogy to the case of mortgages, terms for years were often created for securing the payment of jointures and portions for children, and for other special trusts. Such terms do not determine upon the mere performance of the trusts for which they are created, unless there be a special proviso to that effect in the deed. The legal interest thus continues in the trustee after the trusts are performed; although the owner of the fee is entitled to the equitable and beneficial interest therein. At law the possession of the lessee for years is deemed to be the possession of the

¹ Black. Comm. 158; 2 Fonbl. Eq. 2, ch. 4, § 3, (i); Id. B. 3, ch. 1, § 2, and note (b); Co. Litt. 290 b, Butler's note (1), § 13; Id. 208 a, note (1); Bac. Abridg. *Mortgage*, A.

² See *post*, Chapter on Mortgages, § 1004 to 1035.

owner of the freehold. And, by analogy, courts of equity hold that where the tenant for the term of years is but a trustee for the owner of the inheritance, he shall not oust his *cestui que trust*, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance. It follows the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed, or by will, or by act of law.¹ In short, a term, attendant upon the inheritance by express

¹ 2 Fonbl. Eq. B. 2, ch. 4, § 3, note (i), § 4, note (o); Co. Litt. 290 b, Butler's note (1), § 13; *Whitchurch v. Whitchurch*, 2 P. Will. 236; *Charlton v. Low*, 3 P. Will. 330; *Villers v. Villers*, 2 Atk. 72; *Willoughby v. Willoughby*, 1 Term. Rep. 765. This whole subject was fully considered by Lord Hardwicke, in his masterly judgment in *Willoughby v. Willoughby* (1 Term Rep. 763). The following extract from that opinion contains a clear exposition of the points in the text. "What is the nature of a term attendant upon the inheritance? The attendance of terms for years upon the inheritance is the creature of a court of equity, invented partly to protect real property, and partly to keep it in the right channel. In order to do it, this court framed the distinction between such attendant terms and terms in gross, notwithstanding that, in the consideration of the common law, they are both the same, and equally keep out the owner of the fee, so long as they subsist. But as equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another; and as the common law allows the possession of the tenant for years to be the possession of the owner of the freehold, this court said, where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his *cestui que trust*, nor, *pari ratione*, obstruct him in doing any acts of ownership, or in making any assurances of his estate. And, therefore, in equity, such a term for years shall yield, ply, and be moulded according to the uses, estates, or charges, which the owner of the inheritance declares, or carves out of the fee. Thus, the dominion of real property was kept entire. Of this we meet with nothing in our books before Queen Elizabeth's reign, when mortgages by long terms of years began to come into use. Before that time, the law looked upon very long terms with a jealous eye, and laid them under violent presumptions of fraud; because they tended to prevent the crown of its forfeitures, and the lord of the fruits of his tenures. Neither could there, much before that time, be any use of a term attendant upon the inheritance, to preserve the limitations of a settlement, in many cases; because the tenant for years was in the power of the owner of the freehold, till the statute 21 Hen. VIII. c. 15, which enabled him to falsify a recovery against the tenant of the freehold. Till then, by such a recovery, the term was gone, and, consequently, could attend upon nothing. But since the law was altered by that statute, and the term was preserved, this court could lay hold of it. Proceeding upon these principles, wherever a term for years has been vested in a stranger, in trust for the owner of the inheritance, whether by trust expressly declared, or by construction or judgment of this court, which is called a trust by operation of law,

declaration, or by implication of law, may be said to be governed in equity by the same rules, generally, to which the inheritance is subject.¹

§ 999. Still, although the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it, and the whole benefit and advantage to be made of the term arises from this separation. For, if two or more persons have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it, that, if any one of them obtains an assignment of it, then (unless he is affected by some of the circumstances which equity considers as

this court has said, that the trust or beneficial interest of such a term shall follow or be effected by all such conveyances, assurances, or charges, as the owner creates of the inheritance. Although the law says, that, the term and the fee being in different persons, they are separate, distinct estates, and the one not merged in the other, yet the beneficial and profitable interest of both being in the same person, equity will unite them for the sake of keeping the property entire. Therefore, if the owner of the inheritance levy a fine *sur consueance de droit*, or suffer a common recovery to uses, the trust of the term shall follow, and be governed by those uses, although a term for years is not the subject of a fine *sur consueance de droit*, much less of a common recovery; nor would equity allow the trust of a term in gross to be settled with such limitations. This doctrine is always allowed to have its full effect as between the representatives, that is, the heir, either in fee-simple or fee-tail, of the owner of the inheritance, and the executor, and all persons claiming as volunteers under him; though certain distinctions have been admitted as to creditors, which are not material to the present case. And, in general, the rule has been the same, whether the trust of the term be created by express declaration, or arise by construction and judgment of this court. On this ground are the cases of *Tiffin v. Tiffin*, 2 Ch. Cas. 49 and 55, and *Vern. 1*; *Best v. Stamford*, 2 *Vern.* 420; and *Preced. in Chanc.* 252; *Haytor v. Rod*, 1 P. Will. 360; *Whitchurch v. Whitchurch*, before the Lord's Commissioners, 1725, 2 P. Will. 236, and *Lady Dudley v. Lord Dudley*, *Precedents in Chancery*, 241, 2 Chan. Cas. 160, which was a cause on the custom of London. All these cases were cited at the bar; and I choose to put them together without stating them particularly, because they all tend only to prove this general proposition. But, although in all these cases this court considers the trust of the term as annexed to the inheritance; yet the legal estate of the term is always separate from it, and must be so; otherwise it would be merged. And this gives the court an opportunity to make use of such terms, as a guard and protection to an equitable owner of the inheritance against mesne conveyances, which would carry the fee at common law; or to a person, who is both legal and equitable owner of the inheritance, against such mesne incumbrances, as he ought not to be affected with in conscience. And, here, the court often disannexes the trust of the term from the strict legal fee; but still in support of right."

¹ Sugden on Vendors, ch. 9, § 2, n. 7, p. 450.

fraudulent, or as otherwise controlling his rights) he will be entitled, both at law and in equity, to the estate for the whole continuance of the term, to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of every kind of benefit in the land.¹

§ 1000. Supposing, therefore, that A. purchases an estate which, previous to his purchase, had been sold, mortgaged, leased, and charged with every kind of incumbrance to which real property is subject; in this case A. and the other purchasers, and all the incumbrancers have equal claim upon the estate. This is the meaning of the expression, that their equity is equal. But, if there is a term of years subsisting in the estate, which was created prior to the purchases, mortgages, or other incumbrances, and A. procures an assignment of it in trust for himself, this gives him the legal interest in the lands during the continuance of the term, absolutely discharged from, and unaffected by, any of the purchases, mortgages, and other incumbrances, subsequent to the creation of the term, but prior to his own purchase. This is the meaning of the expression in assignments of terms, that they are to protect the purchaser from all mesne incumbrances. But it is to be observed, that A., to be entitled in equity to the benefit of the term, must have all the following requisites: he must be a purchaser for a valuable consideration; his purchase must, in all respects, be a fair purchase, and free from every kind of fraud; and at the time of his purchase he must have no notice of the prior conveyance, mortgage charge, or other incumbrance. It is to be observed, that mortgagees, lessees, and other incumbrancers are purchasers in this sense, to the amount of their several charges, interests, or rights. If any person of this description, unaffected by notice or fraud, takes a defective conveyance or assignment of the fee, or of any estate carved out of it, defective either by reason of some prior conveyance, or some prior charge or incumbrance; and if he also takes an assignment of a term to a trustee for himself, or to himself, where he takes the conveyance of the inheritance to his trustee; in each of these cases he is entitled to the full benefit of the term; that is, he may use the legal estate of the term to defend his possession during the continuance of the term; or, if he has lost the possession, to recover it at common law, in prefer-

¹ Co. Litt. 290 *b*, Butler's note (1), § 13.

ence to all claimants prior to his purchase, but subsequent to his term.¹

§ 1001. At the common law all terms for years are (as has been intimated) deemed to be terms in gross.² And courts of equity, when they hold terms for years to be attendant upon the inheritance, always do so by affecting the person, holding the term, with a trust for that purpose, either upon the express declaration of the parties, or by implication of law. If the term is made attendant upon the inheritance by express declaration, it is immaterial whether the term, if it were in the same hands with the inheritance, would or would not have merged; or whether it be subject to some ulterior limitation, to which the inheritance is not subject; for the express declaration will be sufficient to make it attendant upon the inheritance. But, if the term is to be made attendant upon the inheritance by implication of law, then it is necessary that it should not be subject to any other limitation, and that the owner of the inheritance should be entitled to the whole trust in the term.³ The general rule is, that where the same person has the inheritance and the term in himself, although he has in one the equitable interest, and in the other the legal interest, there the inheritance by implication draws to itself the term, and makes that attendant upon it. For, as at law, if the legal estate in the term and in the inheritance come into the same hand, the term is merged, and the estate goes to the heir; so in equity, where the

¹ Ibid. The whole of these last two sections have been copied almost verbatim from Mr. Butler's learned note to Co. Litt. 290 *b*, § 13, which gives a thorough, and, at the same time, a condensed view of the doctrines of equity on this subject. The notes of Mr. Fonblanque on the same subject are highly valuable. 2 Fonbl. Eq. B. 2, ch. 4, § 3, notes (*i*), (*l*), § 4, and note (*o*). The basis of the general statements by each of these distinguished authors will be found in the opinion of Lord Hardwicke in the case of *Willoughby v. Willoughby*, 1 Term Rep. 765. See also Sugden on Vendors, ch. 9, § 2, p. 387 to 462 (7th edit.); Id. p. 510 to 529 (9th edit.); 1 Madd. Ch. Pr. 406 to 413; Powell on Mortg. ch. 8, p. 189, 390; Id. 464 to 513, and the notes of Coventry and Hughes.

² *Willoughby v. Willoughby*, 1 T. Rep. 765; *Scott v. Fenhoulllet*, 1 Bro. Ch. R. 69, 70.

³ 2 Fonbl. Eq. B. 2, ch. 4, § 3, note (*l*); *Scott v. Fenhoulllet*, 1 Bro. Ch. R. 70, and Mr. Belt's notes. If there be a substantial intervening interest in a third person, there the term will not by implication or without an express declaration be attendant upon the inheritance. *Scott v. Fenhoulllet*, 1 Bro. Ch. R. 69, 70, and Mr. Belt's notes. Sugden on Vendors, ch. 9, § 2, art. 6, p. 455 to 459 (7th edit.); Id. p. 521 to 525 (9th edit.).

one estate is equitable, and the other legal, it is in the nature of a merger ; and the trust of the term will follow the inheritance.¹

§ 1002. But, although a term may be so attendant upon the inheritance ; yet, as the legal estate in it remains distinct and separate from the inheritance at law, it may at any time be disannexed therefrom by the proper acts of the parties in interest, and be turned into a term in gross at law. And a term so attendant becomes a term in gross, when it fails of a freehold to support it, or it is divided from the inheritance by different limitations from those of the latter.² In many cases, the distinction between terms in gross and terms attendant upon the inheritance, is highly important ; the former being generally treated as mere personalty ; the latter, as partaking of the realty, and following the fate of the inheritance. Thus, for example, a term attendant upon the inheritance will not pass by a will not executed, so as to pass real estate under the statute of frauds. So, such a term is real assets in the hands of the heir ; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term, which follows the inheritance, and is subject to all the charges which would affect the inheritance, must also be real assets.³ On the contrary, a term in gross is personal assets only.⁴

§ 1003. It would lead us too far from the immediate object of these Commentaries to go at large into all the doctrines of courts of equity in regard to terms for years, created upon special trusts. It may be remarked, however, that where such terms are created to raise portions for children upon marriage settlements, and the settler also personally covenants to pay such portions, the real estate is considered as the primary fund, and the personal estate of the covenantor as auxiliary only.⁵ If there be no such personal covenant for the payment of the portions, but only a covenant to

¹ *Capel v. Girdler*, 9 Ves. 510 ; *Best v. Stamford*, 2 Freem. R. 288 ; S. C. Prec. Ch. 252 ; Sugden on Vendors, ch. 9, § 2, art. 6, p. 455 to 459 (7th edit.) ; Id. p. 521 to 525 (9th edit.) ; *Whitchurch v. Whitchurch*, 2 P. Will. 336 ; *Sidney v. Shelly*, 19 Ves. 352 ; *Kelly v. Power*, 2 Ball & Beatt. 253.

² Fonbl. Eq. B. 2, ch. 4, § 3, and notes (i), (l) ; *Willoughby v. Willoughby*, 1 Term R. 765, 770.

³ 2 Fonbl. Eq. B. 2, ch. 4, § 6, and notes (r), (s) ; Sugden on Vendors, ch. 9, § 2, art. 7, p. 459 to 461 ; Id. p. 525 to 528 (9th edit.).

⁴ *Ibid.*

⁵ 1 Madd. Ch. Pr. 327, 398 ; *Lechmere v. Charlton*, 15 Ves. 197, 198 ; *Ante*, § 574, 575 ; *Post*, § 1248, 1249.

settle lands, and to raise a term of years out of the lands for securing the portions, in such a case, even although there be a bond to perform the covenant, the portions are not in any event payable out of his personal estate.¹

¹ *Ibid.*; *Edwards v. Freeman*, 2 P. Will. 437, 438. Very intricate questions have arisen, as to the time when portions are to be raised by trustees for the benefit of children, especially upon reversionary interests. Upon this subject I cannot do better than to quote a passage from the learned commentaries of Mr. Chancellor Kent. (4 Kent. Comm. Lect. 58, p. 148 to 150, 3d edit.) "A very vexatious question has been agitated, and has distressed the English courts, from the early case of *Graves v. Mattison*, down to the recent decision in *Wynter v. Bold*, as to the time at which money provided for children's portions may be raised by sale, or mortgage of a reversionary term. The history of the question is worthy of a moment's attention, as a legal curiosity, and a sample of the perplexity and uncertainty with which complicated settlements 'rolled in tangles,' and subtle disputation, and eternal doubts, will insensibly incumber and oppress a free and civilized system of jurisprudence. If nothing appears to gainsay it, the period at which they are to be raised is presumed to have been intended to be that which would be most beneficial to those for whom the portions were provided. If the term for providing portions ceases to be contingent, and becomes a vested remainder in trustees, to raise portions out of the rents and profits after the death of the parents, and payable to the daughters coming of age, or marriage, a court of equity has allowed a portion to be raised by sale or mortgage in the lifetime of the parents, subject, nevertheless, to the life-estate.* The parent's death is anticipated, in order to make provision for the children. The result of the very protracted series of these discussions for one hundred and fifty years is, that if an estate be settled to the use of the father for life, remainder to the mother for life, remainder to the sons of the marriage in strict settlement, and, in default of such issue, with remainder to trustees to raise portions, and the mother dies without male issue, and leaves issue female, the term is vested in remainder in the trustees; and they may sell or mortgage such a reversionary term, in the lifetime of the surviving parent, for the purpose of raising the portions; unless the contingencies, on which the portions were to become vested, had not happened, or there was a manifest intent that the term should not be sold, or mortgaged in the lifetime of the parents, nor until it had become vested in the trustees in possession. The inclination of the Court of Chancery has been against raising portions out of reversionary terms by sale or mortgage, in the lifetime of the parent, as leading to a sacrifice of the interests of the person in reversion or remainder. And modern settlements usually contain a prohibitory clause against it." *Post*, § 1248, 1249.

CHAPTER XXVII.

MORTGAGES.

[* § 1004. The general definition of mortgages.

§ 1005-1011. The germ of common-law mortgages in the civil law.

§ 1012. At common law the mortgagor was subjected to hardships.

§ 1013. In equity a mortgage, even after forfeiture, is a security.

§ 1014. The equitable doctrine of mortgages long in maturing.

§ 1015. In equity, the mortgagor is treated as the owner of the land.

§ 1016. The mortgagee's interest is merely that of a security.

§ 1016 *a*. If he take possession, is accountable for rents and profits.

§ 1016 *a* and note. The mode of applying rents and profits.

§ 1016 *b*. Is entitled to compensation for necessary repairs.

§ 1016, 1016 *b*. Both mortgagor and mortgagee may be enjoined from waste.

§ 1016 *c*. The purchaser may insist upon keeping incumbrances on foot.

§ 1016 *d*. The purchaser of an equity of redemption compelled to respond to the mortgagee.

§ 1017. The mortgagor holds as owner, but may not commit waste.

§ 1018. The essential quality to create a mortgage is a debt.

§ 1019. The equity of redemption not barred by express agreement.

§ 1020, 1020 *a*. Equitable mortgages created by deposit of title-deeds.

§ 1021. All vested estates may be mortgaged.

§ 1022. How far one having a power to sell may mortgage.

§ 1023. All persons having a vested interest may redeem.

§ 1023 *a*, 1023 *b*. Effect of mortgage to secure future advances.

§ 1023 *c*. Subject further discussed.

§ 1023 *d*. Notice required of subsequent incumbrances.

§ 1023 *e*. Discharge of mortgage and reconveyance.

§ 1024. The mortgagee's remedy by the civil law.

§ 1025. The sale of the premises the more equitable remedy.

§ 1026. English remedy foreclosure, unless in special cases.

§ 1027. This has led to the insertion of powers of sale.

§ 1027 *a*. Such powers construed favorably.

§ 1028. On bills to redeem, sometimes marshal securities.

§ 1028 *a*. Right to redeem barred in twenty years.

§ 1028 *b*. So also of the right of the mortgagee to foreclose.

§ 1030. Difference between a mortgage and pledge of personal estate.

§ 1031. Equity of redemption in chattels foreclosed by sale.

§ 1032. Bill to redeem not proper in cases of pledge.

§ 1033. Foreclosure in equity the effectual remedy for the pledgee.

§ 1034. Subsequent advances presumed to be a lien on the pledge.

§ 1035. This rule in analogy to that of the civil law.

§ 1035 *a*. Prior equities acquired, by notice, or purchase of legal title.

§ 1035 *b*. How the interest of mortgagor or lessor of personalty is liable to execution.

§ 1035 *c*. Mortgage extinguished by payment of debt, &c.

§ 1035 *d*. Mortgage paid cannot be made security for further advance ; but if so agreed, equity will not interfere.

§ 1035 *e*. How mortgage of personalty is waived or extinguished.]

§ 1004. MORTGAGES, as a security, are well understood. During the existence of the system of feudal tenures in its full rigor, mortgages could have had no existence in English jurisprudence, as they were incompatible with the leading objects of that system.¹ The maxim of the feudal law was *Feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus, posse esse, receptum est.*² But, as soon as the general right of alienation of real property was admitted, the necessities of the people almost immediately led to the introduction of mortgages.³ Littleton has enumerated two sorts, which were distinguished by the names of *vadium vivum*, and *vadium mortuum*.⁴ The latter was, in the common law, called a mortgage, from two French words, *mort* (*mortuum*, or dead), and *gage* (*vadium pignus*, or pledge), because, if not redeemed at the stipulated time, it was dead to the debtor.⁵ The former was called simply a living pledge, in contradistinction to the latter, for the reason given by Lord Coke. *Vivum autem dicitur vadium, quia nunquam moritur ex aliquâ parte, quod ex suis proventibus acquiratur.*⁶ Thus, if a man borrowed £100 of another, and made over an estate of lands to him, until he received the same sum out of the issues and profits of the land, it was called a *vivum vadium*; for neither the money nor the land dieth or is lost. But, if a feoffment was made of land, upon condition that, if the feoffer paid to the feoffee the sum of £100 on a certain day, he might re-enter on the land; there, if he did not pay the sum at the day, he could not, at the common law, afterwards re-enter; but (as Littleton said) the land was taken away from him forever, and so dead to him. And, if he did pay at the day, then the pledge was dead as to the feoffee; and, therefore, the feoffee was called tenant in mortgage, the estate being *mortuum vadium*.⁷

§ 1005. It has been generally supposed, that the notion of

¹ Glanville, Lib. 10, cap. 6.

² Bac. Abridg. *Mortgage*, A; 2 Fonbl. Eq. B. 3, ch. 1, § 1, note (a).

³ 2 Fonbl. Eq. B. 3, ch. 1, § 1, and note (a); Bac. Abridg. *Mortgage*, A.

⁴ Litt. § 327, 332; Co. Litt. 202 b, 205 a.

⁵ Glanville seems to give a somewhat different explanation. *Mortuum vadium dicitur illud, cujus fructus vel redditus interim percepti in nullo se acquietant.* Glanv. Lib. 10, cap. 6; 4 Kent, Comm. Lect. 58, p. 136, 137 (3d edit.) and note (b).

⁶ Co. Litt. 205 a.

⁷ Littleton, § 332; Co. Litt. 205 a; 2 Black. Comm. 157.

mortgages, and of the redemption thereof, in the English law, was borrowed from the Roman law, although Mr. Butler contends that they were strictly founded on the common-law doctrine of conditions.¹ Whatever truth there may be in this latter observation, as to the origin of mortgages of lands in the English law, there is no doubt that the notion of the equity of redemption was derived from the Roman law, and that it is purely the creature of courts of equity.² In the Roman law there were two sorts of transfers of property, as security for debts, namely, the *pignus* and the *hypotheca*. The *pignus*, or pledge, was when anything was pledged as a security for money lent, and the possession thereof was passed to the creditor, upon the condition of returning it to the owner when the debt was paid. The *hypotheca* was, when the thing pledged was not delivered to the creditor, but remained in the possession of the debtor.³ In respect to what was called an *hypothecary* action there was no difference between them. *Inter pignus* (says the Institutes) *autem et hypothecam (quantum ad actionem hypothecariam attinet) nihil interest; nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur. Sed in aliis differentia est. Nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori; maxime si mobilis sit. At eam quæ sine traditione nuda conventionione tenetur, proprie hypothecæ appellatione contineri dicimus.*⁴ The Digest states the distinction with still more pregnant brevity. *Proprie pignus dicimus, quod ad creditorem transit; hypothecam, cum non transit, nec possessio ad creditorem.*⁵

§ 1006. In the Roman law, it seems that the word *pignus* was often used indiscriminately to describe both species of securities,

¹ In respect to mortgages of lands, this opinion of Mr. Butler is certainly entitled to great consideration; for Littleton expressly puts mortgages as estates on condition. In respect to mortgages and pledges of personal property, there may have been originally a distinction, borrowed from the civil law. Glanville, Lib. 10, cap. 6. Courts of equity, in a great variety of cases of both sorts, act upon the principles of the civil law.

² 2 Fonbl. Eq. B. 3, ch. 1, § 1, note (a).

³ Halifax, Roman Law, ch. 15, p. 63; Bac. Abr. *Mortgage*, A; The Brig Nestor, 1 Summer, R. 81, 82; Vinn. ad Inst. Lib. 3, tit. 15, Comm. 1, 2; Ryall v. Rolle, 1 Atk. 166, 167; Story on Bailments, § 286.

⁴ Justin. Inst. Lib. 4, tit. 6, § 7; Dig. Lib. 20, tit. 1, l. 5, § 1; Vinn. ad Inst. Lib. 3, tit. 15.

⁵ Dig. Lib. 13, tit. 7, l. 9, § 2.

whether applied to movables or immovables. Thus, it is said in the Digest: *Pignus contrahitur non sola traditione, sed etiam nuda, conventionione, etsi non traditum est.*¹ But, in an exact sense, *pignus* was properly applied to movables, and *hypotheca* to immovables. *Pignus appellatum* (says the Digest) *a pugno, quia res quæ pignori dantur, manu traduntur. Unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constituti.*²

So that it answered very nearly to the corresponding term *pledge* in the common law, which, although sometimes used in a general sense to include mortgages of land, is, in the stricter sense, confined to the pawn and deposit of personal property. In the Roman law, however, there was generally no substantial difference in the nature and extent of the rights and remedies of the parties, between movables and immovables, whether pledged or hypothecated. But in the common law, as we shall presently see, the difference as to rights and remedies between a pledge of personal property and a mortgage of real estate, or even of personal property, is very marked and important.³

§ 1007. In the Roman law there were two sorts of actions, applicable to pledges and hypothecations; the action called *actio pigneratitia*, and that called *actio hypothecaria*. The former was properly an action *in personam*, and divisible into two sorts: (1.) *Actio directa*, which lay in favor of the debtor against the creditor, to compel him to restore the pledge when the debt had been paid;⁴ (2.) *Actio contraria*, which lay in favor of the creditor against the debtor, to recover the proper value or compensation, when the latter had retained possession of the pledge, or when the title to it had failed by fraud or otherwise; or when the creditor sought compensation for expenses upon it.⁵ The *actio hypothecaria*, on the other hand, was strictly *in rem*, and was given to the cred-

¹ Dig. Lib. 13, tit. 7, l. 1.

² Dig. Lib. 50, tit. 16, l. 238, § 2; Pothier, Pand. Lib. 20, tit. 1, n. 1; 1 Domat, B. 3, tit. 1, § 1, art. 1; Vinn. ad Inst. 4, tit. 6, § 8, Comm. 112; Id. Lib. 3, tit. 15, § 4, and Comm. 1; Story on Bailments, § 286; Ryall v. Rowles, 1 Ves. 358; S. C. 1 Atk. 166, 167.

³ See 4 Kent, Comm. Lect. 68, p. 138, 139 (2d edit.); Story on Bailments, § 286, 287; 1 Powell on Mortg. 3, by Coventry, and Hughes, and Rand.

⁴ Just. Inst. Lib. 3, tit. 15, § 4; Vinn. ad Inst. Lib. 3, tit. 15, Comm. 2, 3.

⁵ Dig. Lib. 13, tit. 7, l. 3, 8, 9; Pothier, Pand. Lib. 13, tit. 7, n. 24 to 29; Vinn. ad Inst. Lib. 3, tit. 15, § 4, Comm. 2, 3; Id. Lib. 4, tit. 6, § 8, Comm. 6. The statement of Mr. Powell respecting the *Actio Pigneratitia* and *Hypothecaria* is not accurate. See 1 Brown, Civil Law, 204, note (8).

itor to obtain possession of the pledge, in whosever hands it might be.¹

§ 1008. Without dwelling more upon topics of this sort, which are purely technical, it may be useful to state, as illustrative of some of the doctrines admitted into equity jurisprudence, that, under the civil law, although the debt for which the mortgage or pledge was given, was not paid at the stipulated time, it did not amount to a forfeiture of the right of property of the debtor therein. It simply clothed the creditor with the authority to sell the pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the debtor.² It has been supposed by some writers, that to justify such a sale, it was indispensable that it should be made under a decretal order of some court upon the application of the creditor. But although the creditor was at liberty to make such an application, it does not appear that he might not act, in ordinary cases, without any such judicial sanction, after giving the proper notice of the intended sale, as prescribed by law, to the debtor. When the debtor could not be found, and notice could not be given to him, such a decretal order seems to have been necessary.³ And, where a sale could not be effected, a decree, in the nature of a foreclosure, could be obtained under certain circumstances, by which the absolute property would be vested in the creditor.⁴

§ 1009. This authority to make a sale might be exercised, not only when it was expressly so agreed between the parties, but when the agreement between them was silent on the subject. Even an agreement between them, that there should be no sale, was so far invalid, that a decretal order of sale might be obtained upon the application of the creditor.⁵ On the other hand, if by the agreement it was expressly stipulated that, if the debt was not

¹ Vinn. ad Inst. Lib. 3, tit. 15, § 4, Comm. 3; Id. Lib. 4, tit. 6, § 8, Comm. 1, 2; Pothier, Pand. Lib. 20, tit. 1, § 29 to 36.

² Pothier, Pand. Lib. 20, tit. 5; 1 Domat, B. 3, tit. 1, § 3, art. 1.

³ 1 Bro. Civ. Law, 204, note (8); Cod. Lib. 8, tit. 34, l. 3, § 1 to 3; Heinecc. Elem. Pand. Ps. 4, tit. 5, § 37 to 44; Story on Bailments, § 309; Cortelyou v. Lansing, 2 Cain. Cas. Er. 213.

⁴ Cod. Lib. 8, tit. 34, l. 3, § 2, 3; Pothier, Pand. Lib. 20, tit. 5, n. 34; Vinn. ad Inst. Lib. 2, tit. 8, Comm. 2, 3; Story on Bailments, § 309. But see 4 Kent, Comm. Lect. 58, p. 138, 139 (3d edit.).

⁵ 1 Bro. Civ. Law, 203, 204; 1 Domat, B. 3, tit. 1, § 3, art. 9, 10; Dig. Lib. 13, tit. 7, l. 4; Cod. Lib. 8, tit. 28, l. 14; Pothier, Pand. Lib. 20, tit. 5, n. 1 to 5.

paid at the day, the property should belong to the creditor in lieu of the debt, such a stipulation was held void, as being inhuman and unjust.¹

§ 1010. In some cases, also, by the civil law, a sort of tacking of debts could be insisted on by the mortgagee against the mortgagor; but not against intermediate incumbrancers.² And, where

¹ Domat, B. 3, tit. 1, § 3, art. 11; Cod. Lib. 8, tit. 35, l. 3; 4 Kent, Comm. Lect. 58, p. 136, note (a) (3d edit.).

² Cod. Lib. 8, tit. 27, l. 1; Dig. Lib. 20, tit. 4, l. 20; 1 Domat, B. 3, tit. 1, § 3, art. 3, 4. In a note to the former volume (§ 415, note (1), p. 392, § 420, and notes), it was stated, that the doctrine of tacking mortgages was not known in the civil law. Of course, the remarks there made were applicable to the case of tacking a first and third mortgage, to the exclusion of an intermediate mortgagee; and not what may be called a tacking of debts by the mortgagee, in the case of a mortgagor seeking redemption. It is clear, that the civil law, in the case of the mortgagor seeking to redeem, did not permit it, unless the mortgagor paid, not only the debt for which the mortgage was given, but all other debts due to the mortgagee. Si in possessione fueris constitutus (says the Code), nisi ea quoque pecunia tibi a debitore reddatur, vel offeratur, quæ sine pignore, debetur, eam restituere propter exceptionem doli mali non cogeris. Jure enim contendis, debitores eam solam pecuniam, cujus nomine ea pignora obligaverunt, offerentes audiri non oportere, nisi pro illa satisfecerint, quam mutuum simpliciter acceperunt. But then it is immediately added, that this does not apply to the case of a second creditor. Quod in secundo creditore locum non habet; nec enim necessitas ei imponitur chirographarium etiam debitum priori creditore offerre. (Cod. Lib. 8, tit. 27, l. 1.) For it was expressly held in the civil law, that, where there was a first mortgage, and then a second mortgage, and then the first mortgagee lent another sum to the debtor, he could not tack it against the second mortgagee. Pothier, Pand. Lib. 20, tit. 4, n. 10; Dig. Lib. 20, tit. 4, l. 20. Mr. Chancellor Kent (4 Kent, Comm. Lect. 58, p. 136, note (a); Idem, p. 175, 176, 3d edit.), has said, that, in the civil law, the mortgagee was even allowed to tack another incumbrance to his own, and thereby to gain a preference over an intermediate incumbrance; for which he cites Dig. Lib. 20, tit. 4, l. 3. If, as I presume, his meaning is, that the tacking gave a preference over the intermediate incumbrancer, with great deference, I do not find that the passage cited supports the doctrine; and it seems contrary to the passages already cited from Cod. Lib. 8, tit. 27, l. 1, and Dig. Lib. 20, tit. 4, l. 20. There are other passages in the Code, on the subject of a subsequent mortgagee acquiring the rights of a first mortgagee, by paying his mortgage, and thereby confirming his own title by substitution. But it appears to me, that they do no more than subrogate the subsequent mortgagee to all the rights of the first mortgagee; and that they do not enlarge those rights. See Code, Lib. 8, tit. 18, l. 1, 5; 1 Domat, B. 3, tit. 1, § 3, art. 7, 8; Id. B. 3, tit. 1, § 6, art. 6, 7; Heinecc. Elem. Pand. Ps. 4, tit. 4, § 35. Doctor Brown, too (1 Brown, Civ. Law, 208; Id. 202), insists that a mortgagee might tack another incumbrance to his mortgage; and if he lent more money by way of further charge on the estate, he was, in the civil law, preferred, as to this charge also, before a

movables and immovables were included in the same mortgage, and movables were first to be sold, and applied in the course of payment.¹

§ 1011. These instances are sufficient to show some strong analogies between the Roman law and the equity jurisprudence of England on the subject of mortgages, and to evince the probability, if not the certainty, that the latter has silently borrowed some of its doctrines from the former source.² But to develop them at large would occupy too much space; and we may now, therefore, return to the more immediate subject of mortgages at the common law.

§ 1012. We have already had occasion to take notice of the inconveniences attendant upon the creation of mortgages in fee, and of the substitution in their stead of terms for years.³ But, in truth, whether the one course or the other was adopted, so far as the common law was concerned, the mortgagor was subjected to great hardships and inconveniences if he did not strictly fulfil the conditions of the mortgage at the very time specified; as he thereby forfeited the inheritance, or the term, as the case might be, however great might be its intrinsic value, compared with the debt for which it was mortgaged.⁴

§ 1013. Courts of equity, therefore, acting upon their general principles, could not fail to perceive the necessity of interposing, to prevent such manifest mischief and injustice, which were wholly irremediable at law. They soon arrived at the just conclusion, that mortgages ought to be treated, as the Roman law had treated them, as a mere security for the debt due to the mortgagee; that the mortgagee held the estate, although forfeited at law, as a

mortgage, created in the intermediate time. He cites the Dig. Lib. 20, tit. 4, l. 3, which does not (as has been already stated) seem to support the conclusion. In the equity jurisprudence of England (as we have seen), the heir of a mortgagor cannot (although the mortgagor himself may) redeem without paying the bond debt of the mortgagor, as well as the mortgage debt. *Ante*, § 418, and tacking is also permitted against mesne incumbrancers in certain cases. See *ante*, § 412 to 419; 2 Wooddes. Lect. 24, p. 158, 159; 4 Kent, Comm. Lect. 58, p. 175, 176 (3d edit.); 2 Fonbl. Eq. B. 3, ch. 1, § 9, note (u); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 188 to 191; *Ante*, § 410, note (1).

¹ 1 Bro. Civ. Law, 206, 207; Dig. Lib. 42, tit. 1, l. 15, § 2.

² 4 Kent, Comm. Lect. 58, p. 136, note (a) (3d edit.).

³ *Ante*, § 998.

⁴ See 4 Kent, Comm. Lect. 58, p. 140 (3d edit.).

trust;¹ and that the mortgagor had what was significantly called an equity of redemption, which he might enforce against the mort-

¹ *Seton v. Slade*, 7 Ves. 273; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 182 to 185. When a mortgage is denominated a trust, and the mortgagee a trustee of the mortgagor, the expression is not to be understood in an unlimited sense. It is a trust *sui generis*, and of a peculiar nature. This subject is expounded with great ability by Sir Thomas Plumer, in his masterly judgment in *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1 to 189, &c. The following extract from it is so valuable and important, that I have not been able to persuade myself to omit it, although it is long (p. 182). "As to the position" (said he) "of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built, that the consequences contended for would not follow, even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavored to show. It may be proper, however, to consider how far, and in what respect, he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a court of equity. Lord Mansfield, adverting to the comparisons made in respect to mortgages, has, I think, said, there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters, in which there existed some points of resemblance, when it was not very material to ascertain what his powers or interests were, or to settle, with any great precision, in what respects the resemblance did, and in what it did not, exist. But it would be productive of much error, if it were to be concluded, that the resemblance was complete in every point, to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, of trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee. Quo teneam vultus mutantem Protea nodo? The truth is, it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterize the relation. They are (as Mr. Justice Buller observes in *Birch v. Wright*) characters as well known, and their rights, powers, and interests as well settled as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract. It is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied. Its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession; and he is entitled to enforce his right by an adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. The late Master of the

gagee, as he could any other trust, if he applied within a reasonable time to redeem, and offered a full payment of the debt, and of all equitable charges.¹

Rolls observes, that, in general, a trustee is not allowed to deprive his *cestui que trust* of the possession. But a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked. By not interfering in this latter case, a court of equity does not, as it is supposed, in opposition to its usual principle, refuse to afford a protection to a *cestui que trust* against his trustee. But the interference is refused, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui que trust*. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from disposing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding, which is not only to obtain the possession, but the absolute title to the estate by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest, by the person claiming to be the mortgagor, is a recognition of that relation subsisting between them; but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor. The ground on which a mortgagee is, in any case and for any purpose, considered to have a character resembling that of a trustee, is the partial and limited right which, in equity, he is allowed to have in the whole estate legal and equitable. He does not at any time possess, like a trustee, a title to the legal estate, distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either, he is fully entitled to both, and to the legal and equitable remedies incident to both. But, in equity, his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than, and as may be necessary, to secure the repayment of the money due to him. When that is paid, his duty is to reconvey the estate to the person entitled to it. It never remains in his hands, clothed with any fiduciary duty. He is never intrusted with the care of it; nor under any obligation to hold it for any one but himself; nor is he allowed to use it for any other purpose. The estate is not committed to his care; nor has he the means of preventing, or being acquainted with the changes, which the title to the equity of redemption may undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise; and, consequently, as I have already endeavored to show, by the operation of the analogy, to the statute of limitations." See, also, *Casburne v. Inglis*, 2 Jac. & Walk. 194, 196, in note.

¹ 2 Fonbl. Eq. B. 3, ch. 1, § 13, and note (e); *Seton v. Slade*, 7 Ves. 273.

§ 1014. These doctrines of courts of equity were at first strenuously resisted, and found little public favor, owing to the rigid character of the common law, and the sturdy prejudices of its advocates. We are told by Lord Hale, that, in the fourteenth year of Richard II., Parliament would not admit of an equity of redemption;¹ although it seems not long after to have struggled into existence.² Even as late as the latter part of the reign of Charles II., the same great judge was so little satisfied with encouraging an equity of redemption, that, in a case before him for a redemption, he declared, that, by the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed.³ And, perhaps, the triumph of common-sense over professional prejudices has never been more strikingly illustrated than in the gradual manner in which courts of equity have been enabled to withdraw mortgages from the stern and unrelenting character of conditions at the common law.⁴ Even after the equity of redemption was admitted, it was long maintained, that if the money was not paid at the time appointed, the estate became liable in the hands of the mortgagee to his legal charges, to the dower of his wife, and to escheat.⁵ And it was a common opinion, that there was no redemption against those who came in

¹ *Roscarriek v. Barton*, 1 Ch. Cas. 219; 2 Fonbl. Eq. B. 3, ch. 1, § 2, note (c).

² Butler's note (1) to Co. Litt. 204 b.

³ *Roscarriek v. Barton*, 1 Ch. Cas. 219. But see *Pawlett v. Attorney-General*, *Hardres*, R. 469. Lord Redesdale, in his *Treatise on Equity Pleadings*, seems to attribute the jurisdiction of courts of equity, in cases of non-redemption of mortgages at the prescribed time, to the head of the accident. "In many cases" (says he), "as lapse of time, the courts of equity will relieve against the consequences of the accident in a court of law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law, upon default of payment of the mortgage-money at the time stipulated for payment." Mitford, Eq. Pl. 130, by Jeremy. But this is quite too narrow a ground upon which to rest the general jurisdiction. A trust, arising from the nature of the contract, as a security, is a broader, and, in many cases, a better foundation. See *ante*, § 89, and note, where this passage is also cited. See *Lennon v. Napper*, 2 Sch. & Lefr. 684, 688; *Seton v. Slade*, 7 Ves. 273, 274.

⁴ Mr. Chancellor Kent has said, with great force and felicity of expression, "The case of mortgages is one of the most splendid instances, in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation, we may well say, that 'returning Justice lifts aloft her scale.'" 4 Kent, Comm. Lect. 58, p. 158 (4th edit.).

⁵ Butler's note (1) to Co. Litt. 204 b; Bac. Abr. *Mortgage*, A.

by the *post*. This introduced mortgages for long terms of years,¹ the nature of which we have already somewhat considered.²

§ 1015. Courts of equity, having thus succeeded in establishing the doctrine, in conformity to common sense and common justice, that the mortgage is but a pledge or security for the payment of the debt, or the discharge of the other engagements, for which it was originally given ;³ it yet remained to be determined what was the true nature and character of the equity of redemption, and of the relations between the mortgagor and mortgagee. It has been well observed, that these were not actually settled until a comparatively recent period.⁴ It was formerly contended that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back into his own possession by payment of the debt, or other discharge of the condition. But it is now firmly established, that the mortgagor has an estate in the land in equity, in the nature of a trust estate, which may be granted, devised, and entailed ;⁵ that this equity of redemption, if entailed, may be barred by a fine or recovery ; that it is capable of a *pos-*

¹ Ibid. ; 2 Fonbl. Eq. B. 3, ch. 1, § 2, note (b) ; Bac. Abr. *Mortgage*, A ; 2 Black. Comm. 158.

² *Ante*, § 998, and note. Mr. Butler has stated the advantages and disadvantages of mortgages by way of long terms of years, in a very accurate manner in his note (1) to Co. Litt. 204 b.

³ Com. Dig. *Chancery*, 4 A. 1.

⁴ Ibid. ; 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (d).

⁵ Lord Hale, in *Pawlett v. Attorney-General*, Hardres, R. 469, distinguished between a trust and an equity of redemption, as follows : " There is a diversity " (says he) " betwixt a trust and a power of redemption ; for a trust is created by the contract of the party, and he may direct it as he pleaseth ; and he may provide for the execution of it ; and, therefore, one that comes in the *post* shall not be liable to it without express mention made by the party. And the rules for executing a trust have often varied ; and, therefore, they only are bound by it who come in in privity of estate. A tenant in dower is bound by it, because she is in in the *per* ; but not a tenant by the courtesy, who is in in the *post*. So all who come in in privity of estate, or with notice, or without a consideration. But a power of redemption is an equitable right, inherent in the land, and binds all persons in the *post* or otherwise. Because it is an ancient right, which the party is entitled to in equity. And although, by the escheat, the tenure is extinguished, that will be nothing to the purpose ; because the party may be recompensed for that by the court, by a decree for rent, or part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law, that the law takes notice of it, and makes it assignable and devisable." S. P. cited 2 Fonbl. Eq. B. 3, ch. 1, § 3.

sessio fratris; and that it is liable to tenancy by the courtesy,¹ but not liable to dower.²

§ 1016. In regard to the estate of the mortgagee, it being treated, in equity, as a mere security for the debt, it follows the nature of the debt. And although, where the mortgage is in fee, the legal estate descends to the heir; yet, in equity, it is deemed a chattel interest and personal estate, and belongs to the personal representatives, as assets.³ It is upon the same ground, that an assignment of the debt by the mortgagee carries with it, in equity, as an incident, the interest of the mortgagee in the mortgaged

¹ *Ibid.*; *Casborne v. Scarfe*, 1 Atk. 605, 606.

² *Dixon v. Saville*, 1 Bro. Ch. R. 327, 328.

³ 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (d); *Id.* § 13, note (e); Co. Litt. 208 b, Butler's note (1); 1 Madd. Ch. Pr. 412; Com. Dig. *Chancery*, 4 A. 9; *Casborne v. Scarfe*, 1 Atk. 605; *Demarest v. Wynkoop*, 3 Johns. Ch. R. 145; *Pierce v. Brown*, 24 Verm. 165; 4 Kent, Comm. Lect. 58, p. 150, 160, 164 to 165 (4th edit.). The remarks of Mr. Chancellor Kent, in the passage cited, contain a very exact and luminous view of the equitable doctrine on this subject. It is also very fully discussed in Mr. Butler's note (1) to Co. Litt. 208 b. In adopting the rule of considering mortgages to be personal assets, courts of equity (as Mr. Butler has well remarked) appear to have been guided by the same reasoning, which, in former times, made courts of law consider the estates of tenants by statute merchant, and tenant by statute staple, and by *elegit*, merely as chattels interest. These, from their uncertain nature, ought to have been considered as freehold; but, as Mr. Justice Blackstone observes, being a security and remedy provided for personal debts, to which the executor is entitled, the law has, therefore, directed their succession, as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debt, if recovered, would belong. Butler's note, *Ibid.*; 2 Black. Comm. p. 161, 162; Co. Litt. 42, 43. The mortgage is not only considered as personal estate of the mortgagee; but the debt is also treated as the personal debt of the mortgagor; and, therefore, it is primarily a charge on his personal assets in favor of his heir, his devisee, and other parties standing in a similar predicament. There are exceptions to the doctrine where the land is treated as the primary fund; but they stand on special reasons. See *ante*, § 562 to 578; Co. Litt. 208 b, Butler's note (106); *Howell v. Price*, 1 P. Will. 294, Mr. Cox's note. If a mortgage should happen to be in the disjunctive, payable to the heirs or the executors of the mortgagee; there, a payment to either the heir or the executor will discharge it; and the mortgagor has his election. But if there has been a default of payment at the day, there the mortgage is absolute at law; and the election is gone, and the money is payable exclusively to the executor. This doctrine was very ably expounded, and the reasons stated, in *Thornborough v. Baker*, 1 Ch. Cas. 283. See 2 Fonbl. Eq. B. 2, ch. 1, § 13, and note (e); Co. Litt. 209 b, 210; *Jeremy on Eq. Jurisd.* B. 1, ch. 2, § 1, p. 184, 185; 2 Powell on Mort. ch. 15, p. 662, 667, and the notes of *Coventry & Rand*, *Ibid.*

property; unless, indeed, the instrument of assignment contains a plain exception of the latter.¹ The mortgagee is, however, entitled (unless there be some agreement to the contrary)² to enter into possession of the lands, and to take the rents and profits, if he chooses so to do. But, in such cases, he must account therefor towards the discharge of the debt, after deducting all reasonable charges and allowances.³ So, he may grant leases of the premises, and avoid any leases which have been made by the mortgagor subsequent to his mortgage.⁴ Still, he is treated so entirely as a trustee, that he cannot exercise any right over the mortgaged property, (such, for example, as the renewal of a lease,) for his own benefit; but all acts of this sort done, and all profits made, are deemed to be for the benefit of the party who is entitled to the estate.⁵ A mortgagor has no right to cut timber upon the mortgaged estate; and if he assumes to do so, he will be restrained by an injunction, if it would be injurious to the security of the mortgagee.⁶

§ 1016 a. Where the mortgagee enters into possession of the mortgaged property, he is, of course, accountable for the rents and profits. But courts of equity will not, under such circumstances, ordinarily require annual rests to be made in settling the accounts; as, for example, they will not require annual rests to be made, where the interest of the mortgage is in arrears at the time when the mortgagee takes possession, even although the rents and profits may exceed the annual interest, nor until the principal mortgage debt is entirely paid off.⁷ But where special

¹ *Wheeler v. Wheeler*, 9 Cowen, R. 34; *Whittemore v. Gibbs*, 4 Foster, 484; *Graham v. Newman*, 21 Ala. 497.

² [In cases of mortgages conditioned to support the mortgagee or others, during their life, it seems to be held as impliedly understood that the mortgagor should remain in possession at least until condition broken. *Wales v. Mellen*, 1 Gray, 512; *Norton v. Webb*, 35 Maine, 218; *Brown v. Leach*, Id. 39.]

³ 4 Kent, Comm. Lect. 58, p. 166, 167 (4th edit.). See in what cases, in respect to rents received by the mortgagee, annual rests will be made in equity in favor of the mortgagee. *Wilson v. Cluer*, 3 Beavan, R. 136, 140.

⁴ 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (d); 4 Kent, Comm. Lect. 58, p. 157, 164 to 167 (4th edit.).

⁵ 4 Kent, Comm. Lect. 58, 167 (4th edit.); *Holridge v. Gillespie*, 2 Johns. Ch. R. 33, and cases there cited; *Rakestraw v. Brewer*, 2 P. Will. 511.

⁶ *King v. Smith*,^{*} 2 Hare, R. 239, 242.

⁷ *Finch v. Brown*, 3 Beavan, R. 70; *Wilson v. Cluer*, 3 Beavan, R. 136. In this latter case, Lord Langdale said: "Under these circumstances, the question is,

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circumstances exist, as, for example, where no arrears of interest are due at the time when the mortgagee enters into possession, or any agreement exists between the parties, by which the interest in arrears is converted into principal, there, and in such cases, annual rests will be made.¹

§ 1016 *b*. In respect to the rights of a mortgagee in possession, it may be stated that he will in equity be allowed for all repairs necessary for the support of the property; but not for general improvements made without the acquiescence or consent of the mortgagor, which enhance the value of the estate, especially if they are of such a nature as may cripple the right or power of redemp-

whether the surplus of the rents, after satisfying the interest, ought or ought not to be annually applied in reduction of the principal money due on the mortgage; or, in other words, whether the account ought to be taken against the mortgagee with annual rests. With some qualification, perhaps, it may be said to be a general rule, not to direct annual rests to be made in the accounts of a mortgagee in possession, when the interest is in arrear at the time when he takes possession; and, in the absence of any special reason, I conceive, that, if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable when the arrear of interest is paid off, or till after the whole of the mortgage debt has been paid off by receipt of the rents, although, from the time when the debt is ascertained to be paid off, annual rests will be decreed, though none were ordered previously. I am not aware of any case in which, although the mortgagee may have taken possession under circumstances which did not render him liable to account, with annual rests, there was afterwards a settled account, by which it appeared either that no interest was due, or that any interest which was due was satisfied as interest, by being converted into principal, and the mortgagee continued in the receipt of rents of amount more than sufficient to satisfy the interest of such principal. But it appears to me that such settlement of account ought to be considered as a rest made by the parties themselves; and that the mortgagee, continuing in possession after the statement of such an account, and with no interest due to him, must, from that time, be dealt with as a mortgagee who takes possession without any interest being in arrear." See also *Kittredge v. McLaughlin*, 38 Maine, 513. [*In *Heales v. McMurray*, 23 Beavan, 401, the Master of the Rolls held, that "if the mortgagee give notice to the tenants not to pay rents to the mortgagor, he becomes entitled to take possession, and though he does not do so, he must be answerable to the mortgagor for any loss which may occur. It is his duty either to take possession himself, or to leave the mortgagor in possession."]

¹ *Ibid*. Satisfaction of the debt due upon a mortgage will extinguish all the interest of the mortgagee in the mortgage; and an assignee of the mortgagee will not be in any better condition after such extinguishment of the debt than the mortgagee. See *Wilkinson v. Simson*, 2 Moore, Priv. Coun. R. 275, which was a case arising under the Dutch law. As to when payment by tenant for life is an extinguishment of mortgages or other incumbrances, see 3 Hare, R. 217.

tion.¹ And in no case will a court of equity permit a mortgagee to commit waste or do damage to the estate, as, for example, by pulling down cottages.²

[* § 1016 c. Where the mortgagor contracts to sell the fee-simple of the mortgaged estate, free from incumbrances, the purchaser, with the concurrence of the mortgagee, is entitled, on procuring a discharge of the vendor from all liability in respect of the mortgage debt, and bearing any extra expense occasioned by his demand, to require a conveyance of the equity of redemption, so as to keep the mortgage on foot.³ Where there are incumbrances, in fact, the purchaser may generally insist upon having them kept on foot,⁴ and a proportionate deduction from the purchase-money.

§ 1016 d. And where the purchaser of the equity of redemption covenants, or promises the grantor to pay off an incumbrance upon the land, this duty or obligation enures for the benefit of the mortgagee, or creditor in the incumbrance, and he may, in equity, compel such purchaser to respond directly to him.⁵]

§ 1017. In regard to the mortgagor, he is not, unless there be some special agreement to that effect, entitled of right to the pos-

¹ *Sandon v. Hooper*, 6 Beavan, R. 246. On this occasion, Lord Langdale said: "The next question is, whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times showing what he ought, and to some extent what he ought not, to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving a mortgagor out of his estate,—an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property."

² *Ibid.*

³ [* *Cooper v. Cartwright*, Johnson, 679; *Clark v. May*, 16 Beavan, 273.

⁴ *Clark v. May*, *supra*. It is here held that, in a frivolous suit, costs will be given to neither party.

⁵ *Klapworth v. Dressler*, 2 Beasley, 62.]

session of the land mortgaged. But he holds it solely at the will and by the permission of the mortgagee, who may at any time, by an ejectment, without giving any prior notice, recover the same against him or his tenants. In this respect, the estate of the mortgagor at law is inferior to that of a tenant at will.¹ But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without any account whatsoever therefor to the mortgagee.² Indeed, for most purposes, except where the interest of the mortgagee is concerned, the mortgagor is treated as the substantial owner of the estate.³ He will not, however, be permitted to do any acts injurious to, or diminishing the security of the mortgagee; and if he should commit, or attempt to commit, acts of waste, he will be restrained therefrom by the process of injunction.⁴

§ 1018. As to what constitutes a mortgage, there is no difficulty whatever in courts of equity, although there may be technical embarrassments in courts of law. The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or from any other,⁵ it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof.⁶ Even parol evidence is admissible in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance, abso-

¹ Butler's note (1) to Co. Litt. 204 *b*; 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (*d*); *Keech v. Hall*, Doug. R. 21; *Moss v. Gallimore*, Doug. R. 279; 4 Kent, Comm. Lect. 58, p. 155 (4th edit.).

² *Moss v. Gallimore*, Doug. R. 279, 282; 2 Fonbl. Eq. B. ch. 1, § 13, note (*d*); *Colman v. Duke of St. Albans*, 3 Ves. 25, 32; *Mead v. Lord Orrery*, 3 Atk. 244; 4 Kent, Comm. Lect. 58, p. 156, 157, 164 to 166 (4th edit.); *Ex parte Wilson*, 2 Ves. & B. 252.

³ 4 Kent, Comm. Lect. 58, p. 154 to 157, 160 to 162 (4th edit.).

⁴ *Ibid.*; *Robinson v. Litton*, 3 Atk. 210; *Ushborne v. Ushborne*, 1 Dick. R. 75; *Brady v. Waldron*, 2 Johns. Ch. R. 148.

⁵ See *Waters v. Mynn*, 14 Jurist, 341; *Kintner v. Blair*, 4 Halst. Ch. R. 485; *Russell v. Southard*, 12 How. U. S. R. 139.

⁶ Butler's note (1) to Co. Litt. 203 *b*; 4 Kent, Comm. Lect. 58, p. 142 (4th edit.); 2 Fonbl. Eq. B. 3, ch. 1, § 4, and note (*e*); *Id.* § 5, note (*h*).

lute on its face, was intended between the parties to be a mere mortgage or security for money.¹

§ 1019. So inseparable, indeed, is the equity of redemption from a mortgage, that it cannot be disannexed, even by an express agreement of the parties. If, therefore, it should be expressly stipulated, that unless the money should be paid at a particular day, or by or to a particular person, the estate should be irredeemable, the stipulation would be utterly void.² In this respect courts of equity act upon the same principle, which (we have seen) is avowed in the civil law;³ and most probably it has been borrowed from that source. A distinction also is taken, like that in the civil law, between a conditional purchase, or an agreement for a repurchase, and a mortgage, properly so called.⁴ The former, if clearly and satisfactorily proved to be a real sale, and not a mere transaction to disguise a loan, will be held valid, although every transaction of this sort is watched with jealousy.⁵

¹ *Ante*, § 153, 156, 330, 768, 770 *a*; 2 Fonbl. Eq. B. 2, ch. 3, § 5, note (*h*); 4 Kent, Comm. Lect. 58, p. 142 (4th edit.); *Monis v. Nixon*, 1 Howard, Sup. Ct. R. 118; *Maxwell v. Montacute*, Prec. Ch. 556; S. C. 1 P. Will. 618; *Walker v. Walker*, 2 Atk. 98; *Vernon v. Bethell*, 2 Eden, R. 110; *Bentley v. Phelps*, 2 Wood. & Min. 426; *Marks v. Pell*, 1 Johns. Ch. R. 594; *Howe v. Russell*, 36 Maine, 115; *Hodges v. Tennessee Ins. Co.* 4 Selden, 416; *Bigelow v. Topliff*, 25 Verm. 273; *Bank of Westminster v. Whyte*, 3 Md. Ch. Dec. 508; *Bryan v. Cowart*, 21 Ala. 92; *Johnson v. Huston*, 17 Miss. 58; *Wyman v. Babcock*, 2 Curtis, C. C. 386; 19 How. 289.

² Fonbl. Eq. B. 2, ch. 3, § 4, and note (*e*), § 5; Butler's note (1) to Co. Litt. 204 *b*; *Bonham v. Newcomb*, 1 Vern. R. 232; *Seton v. Slade*, 7 Ves. 273; 4 Kent, Comm. Lect. 58, p. 142, 143 (4th edit.); *Id.* 159; *Holridge v. Gillespie*, 2 Johns. Ch. R. 33, 34; Com. Dig. *Chancery*, 4 A. 1, 2. The cases on this point are fully collected in Butler's note to Co. Litt. 204 *b*, and in 4 Kent, Comm. 142 to 144 (4th edit.). See also *Cortelyou v. Lansing*, 2 Cain. Cas. Err. 209, 210.

³ *Ante*, § 1009; Story on Bailm. § 345; *Cortelyou v. Lansing*, 2 Cain. Cas. Err. 209, 210.

⁴ 1 Domat, B. 3, tit. 1, § 3, art. 11; Dig. Lib. 20, tit. 1, l. 16, § 9. Potest ita fieri pignoris datio, hypothecæve (says the Digest), ut si intra certum tempus non sit soluta pecunia, jure emptoris possideat rem, justo pretio tunc æstimandam; hoc enim casu videtur quodammodo conditionalis esse venditio. Dig. Lib. 20, tit. 1, l. 16, § 9. This approaches nearer to a right of pre-emption than to a conditional sale. See *Orby v. Trigg*, 2 Eq. Cas. Abridg. 599, pl. 25; S. C. 9 Mod. R. 2.

⁵ Butler's note (1) to Co. Litt. 204 *b*; *Barrell v. Sabine*, 1 Vern. 268; *Longuet v. Scawen*, 1 Ves. 402, 406; 1 Powell, Mort. 138, note (Coventry and Rand's edit.); 4 Kent, Comm. Lect. 58, p. 143, 144, 159 (4th edit.); Com. Dig. *Chancery*, 4 A. 2; 2 Fonbl. Eq. B. 3, ch. 1, § 5, note (*h*); *Vernon v. Bethell*, 2 Eden, R. 113; *Goodman v. Grierson*, 2 Ball & Beatt. 278.

§ 1020. Mortgages may not only be created by the express deeds and contracts of the parties, but they may also be implied in equity, from the nature of the transactions between the parties; and then they are termed equitable mortgages.¹ Thus, for instance, it is now settled in England, [and some American States,²] that if the debtor deposits his title-deeds to an estate with a creditor, as security for an antecedent debt, or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the statute of frauds.³ This doctrine has sometimes been thought difficult to be maintained either upon the ground of principle or public policy. And although it is firmly established, it has of late years been received with no small hesitation and disapprobation,⁴ and a disposition has been strongly evinced not to enlarge its operation.⁵ It is not,

¹ See *Abbott v. Stratton*, 3 Jones & Lat. 609.

² *Rockwell v. Hobby*, 2 Sanford, Ch. R. (N. Y.) 9; *Welsh v. Usher*, 2 Hills, Ch. R. (S. C. 166; 10 Smedes & Marshall (Miss.) 418. In other States the doctrine has been rejected; *Shitz v. Dieffenbach*, 3 Barr (Penn.) 233; *Vanmeter v. McFaddin*, 8 B. Monroe (Ky.), 435.

³ *Russell v. Russell*, 1 Bro. Ch. R. 269, and Mr. Belt's note (1); *Ex parte Coming*, 9 Ves. 116, 117; *Birch v. Ellames*, 2 Anst. R. 427, 438; *Ex parte Mountfort*, 14 Ves. 606; *Ex parte Langston*, 17 Ves. 228, 229; *Pain v. Smith*, 2 Mylne & Keen, 417; *Keys v. Williams*, 3 Y. & Coll. 55; *Mandeville v. Welch*, 5 Wheat. R. 277, 284; *Post*, § 1230.

⁴ See *Chapman v. Chapman*, 15 Jurist, 265.

⁵ *Ex parte Haigh*, 11 Ves. 403; *Norris v. Wilkinson*, 12 Ves. 197, 198; *Ex parte Kensington*, 2 V. & B. 83; *Ex parte Coomb*, 17 Ves. 369; *Ex parte Hooper*, 1 Meriv. R. 9; *Ex parte Whitbread*, 19 Ves. 209. In *Keys v. Williams*, 3 Younge & Coll. 55, 61, Lord Abinger said: "The doctrine of equitable mortgages has been said to be an invasion of the statute of frauds; and no doubt there was great difficulty in knowing how to deal with deposits of deeds by way of security after the passing of that statute. But, in my opinion, that statute was never meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A court of law could not assist such a party to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that, till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told that, before he sought equity he must do equity, by repaying the money, in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages, therefore, appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general

therefore, ordinarily applied to enforce parol agreements to make a mortgage, or to make a deposit of title-deeds for such a purpose ; but it is strictly confined to an actual, immediate, and *bonâ fide* deposit of the title-deeds with the creditor, as a security, in order to create the lien.¹ Such an equitable mortgage will not, however, avail against a subsequent mortgagee, whose mortgage has been duly registered, without notice of the deposit of the title-deeds. [It seems, however, that it is the duty of the second mortgagee to inquire of the mortgagor for his title-deeds, and, if he does not do so, he may be guilty of gross negligence, sufficient to invalidate his title ; but it is otherwise if he has made such inquiry, and a reasonable excuse was given for their non-delivery.²] But in cases not affected by the registry acts, the mere fact that a first mortgagee has left the title-deeds in the possession of the mortgagor, without any attendant circumstances of fraud, will not be sufficient to postpone such first mortgagee to a second, who has taken the title-deeds with his mortgage, without any notice of the prior mortgage.³

doctrine, although it may not altogether be in consistency with the statute. The question here is, whether the circumstances under which these deeds were deposited lead to any distinction between this case and others, which have been decided on the general doctrine. It has been very ably argued for the defendant, that the circumstance of the deeds having been deposited, not as a present security, but with a view to a future security, gives rise to such a distinction. Certainly, if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage, such transaction could not be considered as an equitable mortgage by deposit. But it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such case the deeds are given in [as] part of the security, and become pledged from the very nature of the transaction."

¹ *Norris v. Wilkinson*, 12 Ves. 197 to 199.

² *Hewitt v. Loosemore*, 9 Eng. Law & Eq. R. 35. See *Allen v. Knight*, 5 Hare, 272; *Farrow v. Rees*, 4 Beav. 18; *Worthington v. Morgan*, 16 Sim. 547.

³ *Birch v. Ellames*, 2 Anst. 427, 431; *Plumb v. Pluitt*, 2 Anst. 432, 439, 440; *Tourle v. Rand*, 2 Bro. Ch. R. 649, and Mr. Belt's note; *Evans v. Bicknell*, 6 Ves. 182 to 184; *Berry v. Mutual Ins. Co.* 2 Johns. Ch. R. 609, 610; *Evans v. Bicknell*, 6 Ves. 173, 183, 184. Mr. Vice-Chancellor Wigram, in *West v. Reid*, 2 Hare, R. 249, 259, said: "I do not deny that difficulty may sometimes arise in drawing the line between the degree of negligence which shall be sufficient to charge a purchaser, and that mere want of extreme caution which, in the absence of fraud, will excuse him. But the distinction is founded in principle, and the difficulty is one with which (upon the very question of gross negligence) courts of justice are in the daily habit of grappling; and the difficulty in principle is not distinguishable

[* § 1020 *a*. But where the mortgagor, in depositing his title-deeds with the mortgagee, omitted the deed to himself, and subsequently deposited that as a security with his bankers, it was held that the mortgagee had priority over the bankers.¹ And if a *bonâ fide* inquiry is made for the title-deeds, and a reasonable excuse is given for their not being forthcoming, their absence does not affect the purchaser, or mortgagee, with constructive notice of an incumbrance created by the deposit of them.² And it has been

from that which occurs in every other case in which antagonist principles come into immediate conflict with each other. The distinction, which is taken in terms by Sir Edward Sugden (1 Vend. & Pur. Vol. 3, p. 472, ed. 10), is fully borne out by the cases which decide that a person purchasing without obtaining the title-deeds is not affected by notice of an equitable mortgage. *Plumb v. Flint*, *Bicknell v. Evans*; by Lord Thurlow's judgment in *Cothoy v. Sydenham*; by a judgment of Lord Hardwicke, and other cases referred to in the judgment in *Jones v. Smith*. If that distinction be not admitted in a case like *Jones v. Smith*, the unavoidable consequence must be that a man, who mortgages a fraction of his estate, will thereby throw a cloud upon the title to the rest of his estate; and a devise of a single acre of land by a will, which does nothing more, will throw a cloud upon the title of an heir at law to his descended estates; for it is clear, that neither the mortgagor in the one case, nor the heir in the other, can command the production of the mortgage-deed or will; and it is equally clear that nothing but the production of the original itself would be sufficient, if a representation such as *Smith* relied upon be not sufficient. Similar observations would apply to a codicil partially revoking a will, and to every deed executed after the date of a will. In short, let the doctrine of constructive notice be extended to all cases in which the purchaser has notice that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limits which that statement of the rule imposes,—once admit that a purchaser is to be affected with constructive notice of the contents of instruments not necessary to, nor presumptively connected with, the title, only because, by possibility, they may affect it (for that may be predicated of almost any instrument),—and it is impossible, in sound reasoning, to stop short of the conclusion, that every purchaser is affected with constructive notice of the contents of every instrument of the mere existence of which he has notice. A purchaser must be presumed to investigate the title of the property he purchases, and may, therefore, be presumed to have examined every instrument forming a link, directly or by inference, in that title; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly nor presumptively connected with the title, only because they may by possibility affect it." This whole subject is very ably summed up in 4 Kent, Comm. Lect. 58, p. 150, 151 (4th edit.). [* See, also, *Alderson v. White*, 2 De G. & J. 97, as to the distinction between a conditional sale and mortgage.

¹ *Roberts v. Croft*, 24 Beavan, 223.

² *Espin v. Pemberton*, 3 De G. & J. 547. See *Rayne v. Baker*, 6 Jur. N. S. 366.

held that the trustees of a dissenting chapel in England, who had been entrusted with the rebuilding the same, and who had borrowed the deficiency of funds requisite to complete the work, upon a deposit of the title-deeds of the chapel, and who had repaid the same, had a lien on the deeds, which their representatives might enforce, but that they were not entitled to a decree of foreclosure and sale, as by granting such relief the trust would be altogether destroyed.^{1]}

§ 1021. As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage. This is in conformity to the doctrine of the civil law; *Quod emptionem venditionemque recipit, etiam pignorationem recipere potest.*² Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchises, and choses in action, are capable of being mortgaged. But a mere naked possibility or expectancy, such as that of an heir, is not.³ In this respect the civil law seems to differ from ours; for a party might by that law mortgage property, to which he had no present title by contract or otherwise.⁴

§ 1022. As to the persons who are capable of mortgaging an estate, nothing need be said in this place, except so far as regards persons who have qualified interests therein, or are trustees *in autre droit*, or are clothed with particular powers for limited purposes. And here, very difficult questions may arise, as to the construction of such powers, and the competency of such persons to make mortgages. Thus, for example, if a power is given to trustees to sell for the purpose of raising money, a question may arise, whether they may raise money by way of mortgage. But

¹ *Darke v. Williamson*, 25 Beavan, 622.]

² 1 Domat, B. 3, tit. 1, art. 19; Dig. Lib. 20, tit. 1, l. 9, § 1.

³ 4 Kent, Comm. Lect. 58, p. 144 (4th edit.); *Carlton v. Leighton*, 3 Meriv. 667; 1 Powell on Mortg. 17, 18, 23, and note (Coventry & Rand's edit.). Lord Eldon, in *Carlton v. Leighton*, 3 Meriv. R. 667, 670, expressly held, that an expectancy of an heir presumptive or apparent, the fee-simple being in the ancestor, was not an interest or a possibility, nor was capable of being made the subject of an assignment or contract. But may it not operate, although not as a mortgage, yet as a contract for a mortgage? *Post*, § 1040. [* See *Smithurst v. Edmunds*, 1 McCarter, 408.]

⁴ 1 Domat, B. 3, tit. 1, § 3, art. 5, 20.

the solution of such questions properly belongs to a treatise on powers.¹

§ 1023. As to the right of redemption. From what has been already stated, it is clear, that the equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees, and representatives (strictly so called) of the mortgagor; but it is also in the hands of any other persons, who have acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of title.² Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence a tenant for life, a tenant by the courtesy, a jointress, a tenant in dower in some cases,³ a reversioner, a remainder-man, a judgment creditor, a tenant by elegit, the lord of a manor holding by escheat,⁴ and, indeed, every other person, being an incumbrancer, or having legal or equitable title, or lien therein, may insist upon a redemption of the mortgage, in order to the due enforcement of their claims and interests respectively in the land.⁵ When any such person does so redeem, he becomes substituted to the rights and interests of the original mortgagee in the land, exactly as in the civil law. And in some cases a further right of priority by tacking may be acquired, beyond what the civil law allowed.⁶ But no person, except a mortgagor, his heirs or privies

¹ See, on this subject, 4 Kent. Comm. Lect. 58, p. 147, 148 (4th edit.); Sugden on Powers, ch. 9, § 2, p. 437; Id. art. 3, p. 472, 478 (2d edit.); 1 Powell on Mortg. 62, by Coventry & Rand; 3 Powell on Mortg. 1633, note (o), same edit.; Mills v. Banks, 3 P. Will. 1, 6; Wilson v. Troup, 7 Johns. Ch. R. 25.

² 2 Fonbl. Eq. B. 3, ch. 1, § 8, note (p); Co. Litt. 208, Butler's note (1); 4 Kent, Comm. Lect. 58, p. 162, 163 (4th edit.).

³ Ibid. and Co. Litt. 208 a, Butler's note (1); Swannoch v. Lifford, cited Ibid.; S. C. Ambler, R. 6; Kinnoul v. Money, 3 Swanst. R. 208; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 182, 183.

⁴ Downe v. Morris, 3 Hare, R. 394.

⁵ Ibid.; Com. Dig. *Chancery*, 4, A. 4. Even a person claiming under a prior or subsequent voluntary conveyance may, as against the mortgagee, redeem. 2 Fonbl. Eq. B. 3, ch. 1, § 8, and note (p). An assignment of the debt generally draws after it the land mortgaged, as a consequence and an appurtenance of the debt, upon the rule, *Omne principale trahit ad se accessorium*. But an assignment of the mortgage, without an assignment of the debt, is treated, at most, as a transfer of a naked trust. See 4 Kent, Comm. Lect. 58, p. 194 (4th edit.).

⁶ *Ante*, § 410 to 421, and notes; *Ante*, § 1010, and note (2); Com. Dig. *Chancery*, 4 A. 10; 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (u); § 11, note (a). Where a mortgagee has two mortgages upon different estates, separately mortgaged to

in estate, has a right to redeem, or to call for an account unless, indeed, it can be shown, that there is collusion between them and the mortgagee. Hence it is, that a mere annuitant of the mortgagor (who has no interest in the land) has no title to redeem.¹ [For the same reason, one who has merely a bond from the mortgagor to convey the equity of redemption, but no conveyance thereof, cannot, in his own name alone, maintain a bill to redeem. He must have not merely a *jus ad rem*, but a *jus in re*.²]

[* § 1023 a. And one who has the assignment of the debt, with the right to retain a portion of it, the remainder belonging to the

him by the mortgagor, and one of them is a deficient security for the debt, and the other is more than sufficient, the mortgagor and his heirs will not be permitted to redeem one without redeeming the other. 1 Madd. Ch. Pr. 425; *Shuttleworth v. Laywick*, 1 Vern. R. 245; *Mergrave v. Le Hooke*, 2 Vern. R. 207; *Pope v. Onslow*, 2 Vern. R. 286; *Jones v. Smith*, 2 Ves. Jr. 376. But see *Ex parte King*, 1 Atk. 300. And if the equity of redemption of one of the estates be sold, the purchaser will not be permitted to redeem that estate (if the mortgage has become absolute at law) without redeeming both mortgages. *Purefoy v. Purefoy*, 1 Vern. 29, and Mr. Raithby's note; *Ex parte Carter, Ambler*, R. 733; *Jones v. Smith*, 2 Ves. Jr. 376; *Ireson v. Denn*, 2 Cox, R. 425; *Willie v. Lugg*, 2 Eden, R. 80. The ground of this doctrine is, that he who seeks equity must do equity; and a court of equity will not assist any person in depriving a mortgagee of any security, which he would have against the mortgagor. See, also, 2 Fonbl. Eq. B. 2, ch. 3, § 9, and note (x).

¹ *White v. Parnter*, 1 Knapp, R. 229; *Troughton v. Binkes*, 6 Ves. 572. Lord Winford, in delivering the opinion of the court, in *White v. Parnter*, 1 Knapp, R. 229, said: "But it has been said, that, as the mortgagee has, within twenty years, acknowledged the existence of the mortgage, the mortgagor has, on account of such acknowledgment, a right to sue for the redemption of the estate; and that this annuitant, whose claim is against the equity of redemption, has a right, as the mortgagor does not object to it, to claim through his side against the mortgagee. If so, every legatee of the mortgagor must have the same right of insisting that the mortgage debt is satisfied, and of calling on the mortgagee to give him an account of the proceeds of the estate from the time of the death of the mortgagor, a period of above fifty years. If creditors or legatees of the mortgagor had the right of calling mortgagees to separate accounts, every mortgagee would be liable to be ruined by the different suits that might be instituted against him. But from the principle laid down in the case of *Troughton v. Binkes* (6 Vesey, 572), and the cases referred to by the Master of the Rolls in his judgment in that case, I think that the mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shown that they and the mortgagee are in collusion to prevent creditors or legatees from recovering what is due to them from the mortgagor's property."

² *Grant v. Duane*, 9 Johns. 612; *Porter v. Read*, 1 Appleton, 363; *McDougald v. Capron*, 7 Gray, 278.

assignor, but no assignment of the mortgage-deed, cannot maintain a bill to foreclose. That should be in the name of the party holding the deed, who will recover the portion of the debt assigned for the benefit of the assignee.¹ And in case of a mortgage to secure future advances, where the mortgagee has notice of a subsequent mortgage, he cannot hold his security for advances made after such notice.² This question is discussed very much at length in the House of Lords, in the case of *Shaw v. Neale*, and the early case of *Gordon v. Graham*³ substantially overruled. There can be no doubt, we apprehend, of the entire soundness of the conclusion to which their lordships came, notwithstanding the efforts sometimes made to establish the contrary rule.

§ 1023 *b*. This subject is very extensively discussed in the late case of *Seymour v. Darrow*,⁴ and the following propositions established. That a mortgage to secure future advances, expressed in any form upon the face of the deed and registry, which is intelligible and not calculated to mislead future incumbrancers is valid; and the mortgagee may continue to make advances until he has express notice of some future incumbrance, or alienation of the title of the mortgagor. That this may be done by a mortgage to secure "all the notes and agreements I now owe or have with him," it being shown that the mortgagee at that time held a note against the mortgagor, expressed to be by way of indemnity for future advances and indorsements; and that it was the duty of subsequent incumbrancers to make inquiry of the first mortgagee, in regard to his claims against the land, under the mortgage. And if they take subsequent mortgages upon the same premises, without this precaution, they will be postponed to all claims of the first mortgagee, which existed prior to the notice of the subsequent incumbrance, although such claims consist merely of indorsements, or guaranties, given by the mortgagee on behalf of the mortgagor, no actual payments having been made until after notice of the subsequent incumbrance.

§ 1023 *c*. We have discussed the question of mortgages to se-

¹ [* *Morley v. Morley*, 25 Beavan, 253.

² *Shaw v. Neale*, 20 Beavan, 157; S. C. 6 H. Lords Cases, 581; *Rolt v. Hopkinson*, 25 Beavan, 461. When this case came before the Lord-Chancellor on appeal, the judgment of the Master of the Rolls was affirmed, and the case of *Gordon v. Graham* distinctly overruled. 4 Jur. N. S. 919.

³ 2 Eq. Cas. Ab. 598.

⁴ 31 Vt. R. 122.

cure future advances, in a leading article in the *American Law Register*,¹ and our examination of the question led to the result, that where the contract binds the mortgagee to make the advances, absolutely, although the payment is future, the debt is present, and the binding force of the mortgage, and the extent of the incumbrance is the same as if the advances were made at the date of the mortgage; but where the advances depend upon the continued consent of both the mortgagor and mortgagee, and is in effect to secure a balance of running account, the force of the security is liable to be affected by subsequent incumbrances, which are legally brought home to the knowledge of the first mortgagee.

§ 1023 d. It does not seem important how the knowledge of the subsequent mortgage is obtained by the first mortgagee, provided it be of a character to convince the mind and conscience of the actual existence of such mortgage. In some of the States the registry of the second mortgage is regarded as sufficient.² In other States formal notice is required from the subsequent mortgagee.³ But the general rule, both in England and America, seems to be that one must have such information of the later incumbrance as upon faithful inquiry will discover its existence and extent.⁴

§ 1023 e. The question of the assignment and discharge of mortgage interests is very lucidly discussed by the Judicial Committee of the Privy Council in the recent case of *Walker v. Jones*,⁵ which was an appeal from the decision of the Supreme Court of New South Wales. It was here declared that the assignee of a mortgage cannot stand in any different character, or hold any different position from that of the mortgagee himself, though the mortgagor may not himself have been a party to the assignment. Every mortgagor has a right to have a reconveyance of the mortgaged property upon payment of the money due upon the mort-

¹ Vol. 2, N. S. 12.

² *Spader v. Lawler*, 17 Ohio, 371; *Ter Hoven v. Kerns*, 2 Penn. St. 96; *Parmentier v. Gillespie*, 9 Id. 86.

³ *McDaniels v. Colvin*, 16 Vt. 300.

⁴ *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Montefiore v. Browne*, 7 Ho. Lds. Cas. 214; *Lord Romilly*, in *Rolt v. Hopkinson*, 25 Beavan, 461.

⁵ 12 Jur. N. S. 381. One standing in fiduciary relation not allowed to charge bonus for services growing out of the relation. *Barrett v. Hartley*, 12 Jur. N. S. 526.]

gage; and every mortgagee is charged with the duty of making such reconveyance upon such payment being made.]

§ 1024. As to the correspondent right of foreclosure, and other remedies for the mortgagee, to secure the due discharge of the mortgage, they naturally flow from the principles already stated. We have already seen,¹ that, in the civil law, there were two remedies allowed to the mortgagee, a remedy *in rem*, and also a remedy *in personam* against the mortgagor for the debt. The general remedy *in rem* was by a sale by the mortgagee of the mortgaged estate, either under a judicial decree, or without such a decree, by his own voluntary act of sale, after a certain fixed notice to the debtor. In either case, the sale, if *bonâ fide* and regularly made, was valid to pass the absolute title to the estate against the mortgagor and his heirs; and the proceeds were first to be applied to the discharge of the debt; and the surplus, if any, was to be paid over to the mortgagor or his representatives. This seems to have been the ordinary course in the civil law, in order to obtain satisfaction of the debt out of the mortgaged estate. But in some cases, and especially where a sale could not be made effectual, a decree might be obtained, in the nature of a foreclosure, by which, after certain judicial proceedings, the absolute dominion of the property would be passed to the mortgagee.² This was probably the origin of the present mode of extinguishing the rights of the mortgagor by a decree of foreclosure in a court of equity.

§ 1025. The natural course, and certainly the most convenient and beneficial course, for the mortgagor, would seem to be, for the court to follow out the civil-law rules on this subject;³ that is to say, primarily and ordinarily, to direct a sale of the mortgaged property, giving the debtor any surplus after discharging the mortgaged debt; and secondarily, to apply the remedy of foreclosure only to special cases, where the former remedy would not apply,

¹ *Ante*, § 1007.

² *Ante*, § 1008, 1009.

³ In most, if not all cases, it would be equally beneficial to the mortgagee; as it would prevent the delays incident to the common decree of foreclosure, which is liable to be reopened; and would also prevent any difficulty in obtaining the residue of the debt, when the mortgaged property is not sufficient to discharge it. See 4 Kent, Comm. Lect. 58, p. 146, 147, 181, 182 (4th edit.). See also *Perry v. Barker*, 13 Ves. 198, 202; *Tooke v. Hartly*, 2 Bro. Ch. R. 125, and Mr. Belt's note (1); S. C. 2 Dick. R. 785; 3 Powell on Mortg. 1046, note T, by Coventry, (Coventry & Rand's edit.).

or might be inadequate or injurious to the interests of the parties. This course has accordingly been adopted in many of the American courts of equity; and it is also the prevailing practice in Ireland. It is done without any distinction, whether there is a power to sell contained in the mortgage or not.¹

§ 1026. In England, a practice widely different has prevailed. A bill for a foreclosure is deemed, in common cases, the exclusive and appropriate remedy; and the courts of equity in that country refuse, except in special cases, to decree a compulsory sale against the will of the mortgagor. These courts, however, have departed from this general rule in certain cases: (1.) where the estate is deficient to pay the incumbrance;² (2.) where the mortgagor is dead, and there is a deficiency of personal assets;³ (3.) where the mortgage is of a dry reversion;⁴ (4.) where the mortgagor dies, and the estate descends to an infant;⁵ (5.) where the mortgage is of an advowson;⁶ (6.) where the mortgagor becomes bankrupt, and the mortgagee prays a sale; (7.) or where the mortgagor is dead, and the mortgagee by his bill, brought against the executor or administrator and the heir, prays for the sale of the mortgaged estate, alleging it to be scanty security, and for the payment of any deficiency out of the general estate of the deceased mortgagor;⁷ (8.) where the mortgage or charge is purely equitable, as, for example, by a deposit of title-deeds;⁸ (9.) where the mortgage

¹ 4 Kent, Comm. Lect. 58, p. 181, 182 (4th edit.); *Brinckerhoff v. Thalhimier*, 2 Johns. Ch. R. 486; *Mills v. Dennis*, 3 Johns. Ch. R. 369, 370; *Perry v. Barker*, 13 Ves. 205; 3 Powell on Mortg. 963, Coventry's note B (Cov. & Rand's edit.); 1 Dow, Parl. R. 20; *McDonough v. Shewbridge*, 2 Ball & Beatt. 555. But although the mortgagee may pray a sale, yet it seems, that in Ireland, a mortgagor cannot insist on a sale, but is only entitled to redeem. *McDonough v. Shewbridge*, 2 Ball & Beatt. 555. Can a pledgor compel a sale by the pledgee? See Story on Bailments, § 320.

² *Dashwood v. Bithazey*, Mosel. R. 196.

³ *Daniel v. Skipwith*, 2 Bro. Ch. R. 155.

⁴ *How v. Vigneres*, 1 Ch. Rep. 32.

⁵ *Booth v. Rich*, 1 Vern. 295; *Monday v. Monday*, 1 Ves. & B. 223. But see *Goodier v. Ashton*, 18 Ves. 83; *Mills v. Dennis*, 3 Johns. Ch. R. 369, 370; 3 Powell on Mortg. 982, 983 *a*, 984 *b*, by Coventry & Rand, and notes, *ibid.*, and especially note (z); *Gore v. Stackpole*, 1 Dow, R. 18; 2 Fonbl. Eq. B. 2, ch. 3, § 8, 12, note (b); *Davis v. Dowding*, 2 Keen, R. 245.

⁶ *Mackensie v. Robinson*, 3 Atk. 559; 2 Fonbl. Eq. B. 2, ch. 3, § 3, note (d).

⁷ *King v. Smith*, 2 Hare, R. 239.

⁸ *Pain v. Smith*, 2 Mylne & Keen, 417; *Parker v. Housefield*, 2 Mylne & Keen, 419; *Meller v. Woods*, 1 Keen, R. 16, 23; *Russell v. Russell*, 1 Bro. Ch. R. 269;

is of land, and by the local law is subject to a sale;¹ such as, for example, in Ireland and America.

§ 1027. It is difficult to perceive any solid or distinct ground, upon which these exceptions stand, which would not justify the courts of equity in England in decreeing a sale at all times, when it is prayed for by the mortgagee, or when it would be beneficial to the mortgagor. The inconveniences of the existing practice of foreclosure in that country are so great, that it has become a common practice to insert in mortgages a power of sale upon default of payment. And, although Lord Eldon, at first, intimated an opinion unfavorable to such a power, as dangerous, it is now firmly established.²

[* § 1027 *a*. And such powers of sale are construed liberally for the purpose of effecting their general object. Thus a power to sell, either by public auction or private contract, and a sale by private contract, with an agreement that a portion of the money might remain on mortgage of the property sold, was held valid. But where the same mortgagee, being in possession, agreed to sell a portion of the land for the site of an hospital, and to give the price to the charity, it was held not to come within the terms of the power.³ But where there are successive incumbrancers, and one of them insists upon a foreclosure, the English courts do not order a sale, although the other parties insist upon it.⁴]

§ 1028. In bills for redeeming mortgages, where there are various persons claiming adverse rights and limited interests in the mortgaged estate, it often becomes necessary to direct how assets and securities are to be marshalled, in order to do justice between

Brocklehurst v. Jessop, 7 Sim. R. 438; *Thorpe v. Gartside*, 2 Younge & Coll. 730; *Greenwood v. Firth*, 2 Hare, R. 241, note. But six months are allowed to redeem before the sale is made. *Ibid.*; *Post*, § 1230.

¹ 4 Powell on Mortg. 1016, *Coventry & Rand's* note; *Stileman v. Ashdown*, 2 Atk. 477, 608; *S. C. Ambler*, R. 13, and *Mr. Blunt's* note, p. 16, note (b); *Post*, § 1216 *a*; *Bronson v. Kinzie*, 1 Howard's Sup. Ct. R. 321.

² 4 Kent, Comm. Lect. 58, p. 146, 147 (4th edit.), and note; *Croft v. Powell*, Comyns, R. 603; *Anon.* 6 Madd. R. 15; *Clay v. Sharpe*, Sugden on Vendors, p. 326, and App. No. 14 (7th edit.); *Corder v. Morgan*, 18 Ves. 344; 1 Powell on Mortg. 9, 13, *Coventry's* note K, and *Rand's* note (1); *Doolittle v. Lewis*, 7 Johns. Ch. R. 45; *Richard v. Holmes*, 18 How. 143; *Saloway v. Strawbridge*, 35 Eng. Law & Eq. R. 447.

³ [* *Davey v. Durrant*, 1 De G. & J. 535.

⁴ *Messer v. Boyle*, 21 Beavan, 559. See also *Jones v. Bailey*, 17 Beavan, 582; *Cox v. Toole*, 20 Beavan, 145; *Footner v. Sturgis*, 5 De G. & S. 736.]

the different claimants, and to prevent irreparable mischiefs, as well as to ascertain the amounts and proportions in which they should contribute towards the discharge of the incumbrances common to them all. This subject, in many of its most important bearings, has already been examined in other places.¹ Similar principles prevailed (as we have seen), to a great extent, in the civil law, in which the right of substitution was admitted, as well as what was technically called the benefit of discussion, answering, in some measure, to our doctrine of marshalling assets and securities.²

§ 1028 a. In respect to the time within which a mortgage is redeemable, it may be remarked, that the ordinary limitation is twenty years from the time when the mortgagee has entered into possession, after breach of the condition, under his title, by analogy to the ordinary limitation of rights of entry and actions of ejectment.³ If, therefore, the mortgagee enters into possession in his character of mortgagee, and by virtue of his mortgage alone, he is for twenty years liable to account; and, if payment be tendered to him he is liable to become a trustee of the mortgagor, and to be treated as such. But if the mortgagor permits the mortgagee to hold the possession for twenty years without accounting, or without admitting that he possesses a mortgage title only, the mortgagor loses his right of redemption, and the title of a mortgagee becomes as absolute in equity, as it previously was in law. In such a case the time begins to run against the mortgagor from the moment the mortgagee takes possession in his character, as such; and if it has once begun to run, and no subsequent admission is made by the mortgagee, it continues to run against all persons claiming under the mortgagor, whatever may be the disabilities to which they may be subjected.⁴ But if the mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor and the validity of the conveyance which he takes. So that, if the conveyance be such as gives him the estate of a tenant for life only

¹ *Ante*, § 499, 558 to 560, 564, 565, 567, 574, 576, 633 to 636; *Post*, § 1233 a.

² *Ante*, § 494, 635, 636, and note (1).

³ *Raffety v. King*, 1 Keen, R. 602, 609, 610, 616, 617; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 191; S. C. 4 Bligh, N. S. 1; *Corbett v. Barker*, 1 Anst. R. 138; S. C. 3 Anst. R. 755; *White v. Parnter*, 1 Knapp, R. 228, 229.

⁴ *Ibid.* See *Robinson v. Fife*, 3 Ohio, St. R. 551; *Ayres v. Waite*, 10 Cush. R.

in the equity of redemption, there, as he unites in himself the characters of mortgagor and mortgagee, he is bound to keep down the interest of the mortgage like any other tenant for life for the benefit of the persons entitled to the remainder; and time will not run against the remainder-man during the continuance of the life-estate.¹

§ 1028 *b*. Similar considerations will, in many respects, apply to the right of foreclosure of a mortgagee. If he has suffered the mortgagor to remain in possession for twenty years after the breach of the condition, without any payment of interest, or any admission of the debt, or other duty, the right to file a bill for a foreclosure will generally be deemed to be barred and extinguished.² However, in cases of this sort, as the bar is not positive, but is founded upon a presumption of payment, it is open to be rebutted by circumstances.³

[* § 1029. These highly equitable principles have commended themselves to adoption by the enlightened jurisprudence of all ages and in all countries.⁴]

§ 1030. A mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and, if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. The latter only passes the possession, or, at most, a special property only to the pledgee, with a right of retainer, until the debt is paid, or the other engagement is fulfilled.⁵ [Delivery is also essential to a pledge, whereas it may not always be to a mortgage.⁶] The difference between them

¹ *Raffety v. King*, 1 Keen, R. 601, 609, 610, 616 to 618; *Corbett v. Barker*, 1 Anst. R. 138; S. C. 3 Anst. 755; *Reeve v. Hicks*, 2 Sim. & Stu. 403; *Ravald v. Russell*, 1 Younge, R. 19.

² *Stewart v. Nicholls*, 1 Tamlyn, R. 307; *Christophers v. Sparke*, 2 Jac. & Walk. 223; *Trash v. White*, 3 Bro. Ch. R. 289; *Toplis v. Baker*, 2 Cox, R. 119. See also *White v. Parnter*, 1 Knapp, R. 228, 229.

³ *Ibid.* *Richmond v. Aiken*, 25 Verm. 324.

⁴ See 1 Domat, B. 3, tit. 1, § 3, art. 6, and note, *ibid.*; Cod. Lib. 8, tit. 14, l. 2; Code Civ. of Louisiana, art. 3366, 3367.

⁵ 4 Kent, Comm. Lect. 58, p. 138 (4th edit.); Story on Bailments, § 287; *Ryall v. Rolle*, 1 Atk. 166, 167; *Ratcliff v. Davies*, Cro. Jac. 244; *Barrow v. Paxton*, 5 Johns. R. 258; *Strong v. Tompkins*, 8 Johns. R. 97, 98; *McLean v. Walker*, 10 Johns. R. 472; *Cortelyou v. Lansing*, 1 Cain. Cas. Err. 200, 202; Com. Dig. *Mortgage*, A.

⁶ *Walcott v. Keith*, 2 Foster, 196; *Whittle v. Skinner*, 23 Verm. 531.

was well stated by a learned judge, in a comparatively recent case. "A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, or the course of trade to be a lien upon them."¹

§ 1031. In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem within a reasonable time.² There is, however, a difference between mortgages of land and mortgages of personal property, in regard to the rights of the mortgagee, after a breach of the condition. In the latter case, there is no necessity to bring a bill of foreclosure: but the mortgagee, upon due notice, may sell the personal property mortgaged, as he could under the civil law; and the title, if the sale be *bond fide* made, will vest absolutely in the vendee.³ And it makes no difference, whether the personal property mortgaged consists of goods or of stock, or of personal annuities.⁴

§ 1032. In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such a demand, his personal representatives may redeem.⁵ Generally speaking, a bill in equity to redeem will not lie on the behalf of the pledgor or his representatives, as his remedy upon a tender is at law. But if any special ground is

¹ Jones v. Smith, 2 Ves. Jr. 378.

² See Kemp v. Westbrook, 1 Ves. 278; Hart v. Ten Eyck, 2 Johns. Ch. R. 100, 101; Harrison v. Hart, Comyns, R. 392, 411.

³ Tucker v. Wilson, 1 P. Will. 261; Lockwood v. Ewer, 9 Mod. R. 275; S. C. 2 Atk. 303; Hart v. Ten Eyck, 2 Johns. Ch. R. 100, 101; 2 Fonbl. Eq. B. 2, ch. 3, § 4, and note (f); 1 Domat, B. 3, tit. 1, § 3, art. 9; Parker v. Brancker, 22 Pick. 46; De Lisle v. Priestman, 1 Browne, 176; Doane v. Russell, 3 Gray, 384; Story on Bailments, § 309; Cortelyou v. Lansing, 1 Cain. Cas. Err. 210, 213; Dame v. Mallory, 16 Barbour, 46.

⁴ Ibid.

⁵ 4 Kent, Comm. Lect. 58, p. 138 (4th edit.); Story on Bailments, § 308, 345, 346, 348; Glanville, Lib. 10, cap. 6, 8; Cortelyou v. Lansing, 1 Cain. Cas. Err. 200, 203; Demandray v. Metcalf, Prec. Ch. 420; S. C. 2 Vern. 691, 698; Gilb. Eq. R. 104; Vanderzee v. Willis, 3 Bro. Ch. R. 21; Kemp v. Westbrook, 1 Ves. 278.

shown, as if an account or a discovery is wanted, or there has been an assignment of the pledge, a bill will lie.¹

§ 1033. On the other hand, the pledgee might, according to Glanville, at any time bring a suit at the common law to compel the pledgor to redeem by a given day; and, if he did not then redeem, he was forever foreclosed of his right.² But the course now adopted is, to bring a bill in equity to foreclose and sell the pledge; in which case an absolute title passes to the vendee.³ It has been also said, that the pledgee may after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale;⁴ [but it is at least questionable whether the pledgee in such case could convey an absolute title, divested of the right of the pledgor to redeem.⁵]

§ 1034. There is another consideration applicable to cases of mortgages and pledges of personal property, which does not apply,

¹ *Kemp v. Westbrook*, 1 Ves. 278; *Demandray v. Metcalf*, Prec. Ch. 419, 420; *Jones v. Smith*, 2 Ves. Jr. 372; *Hasbrouck v. Vandervoort*, 4 Sandf. 74.

² *Glandville*, Lib. 10, cap. 8; 1 *Cain. Cas. Err.* 204, 205; 4 *Kent, Comm. Lect.* 58, p. 138 (4th edit.).

³ 4 *Kent, Comm. Lect.* 58, p. 139 (4th edit.); *Story on Bailments*, § 308, 310, 317; *Ex parte Mountfort*, 14 Ves. 606.

⁴ *Kemp v. Westbrook*, 1 Ves. 278; *Lockwood v. Ewer*, 9 Mod. 278; *Cortelyou v. Lansing*, 1 *Cain. Cas. Err.* 202, 203, 210; *Garlick v. James*, 12 *Johns. R.* 146; 2 *Kent, Comm. Lect.* 40, p. 581, 582 (4th edit.); 4 *Kent, Comm. Lect.* 58, p. 139 (4th edit.); *Story on Bailments*, § 310; *Jeremy on Eq. Jurisd. B.* 1, ch. 2, § 2, p. 196. The doctrine that the pledgee has a right to sell the pledge absolutely, after the due notice to the pledgor, is so frequently stated that it is laid down in the text as clear law. [See also *Shaw, C. J.*, in *Doane v. Russell*, 3 *Gray*, 384.] The cases, however, in which it has been asserted, are generally cases of mortgages of personal property, and not of mere pledges, strictly so called. Whether there is any substantial distinction between the cases, is left for the consideration of the learned reader. None has as yet been taken in courts of equity, as to this point. In *Pothonier v. Dawson*, *Holt's N. P. Rep.* 385 (which was the case of a pledge sold), Lord Chief Justice Gibbs said: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this: If I, the borrower, repay the money, you must redeliver the goods. But if I fail to repay it, you must use the security I have left to repay yourself. I think, therefore, the defendant had a right to sell." There is certainly much sound sense to commend itself in this interpretation of the contract of pledge in such a case.

⁵ See *Lucketts v. Townsend*, 3 *Texas*, 119.

or at least is not as cogent, in cases of mortgages of land. The latter pass by formal conveyances; the former may be transferred by the mere change of possession. A subsequent advance made by a mortgagee or a pledgee of chattels would attach by tacking to the property in favor of such mortgagee, when a like tacking might not be allowed in cases of real estate. Thus, for instance, in the case of a mortgage of real estate, the mortgagee cannot, as we have seen, compel the mortgagor, upon an application to redeem, to pay any debts subsequently contracted by him with, or advances made up to him by the mortgagee, unless such new debts or advances are distinctly agreed to be made upon the security of the mortgaged property.¹ But in the case of a mortgage or pledge of chattels, the general rule, or at least the general presumption, seems the other way. For it has been held, that, in such a case, without any distinct proof of any contract for that purpose, the pledge may be held, until the subsequent debt or advance is paid, as well as the original debt. The ground of this distinction is, that he who seeks equity must do equity; and the plaintiff, seeking the assistance of the court, ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum but upon the credit of the pledge, which he had in his hands before.² The presumption may, indeed, be rebutted by circumstances; but, unless it is rebutted, it will generally, in favor of the lien, stand for verity against the pledgor himself, although not against his creditors, or against subsequent purchasers.³

§ 1035. It is not improbable, that this doctrine, respecting mortgages and pledges of chattels being held as security for subsequent debts and advances, was borrowed from the civil law, al-

¹ *Ante*, § 417, and note, § 418; *Mathews v. Cartwright*, 2 Atk. 347; *Brace v. Duchess of Marlborough*, 2 P. Will. 491, 492, 494; *Shepherd v. Titley*, 2 Atk. 352, 354; *Anon.* 2 Ves. 662; *Lowthian v. Hasel*, 3 Bro. Ch. R. 162; *Jones v. Smith*, 2 Ves. Jr. 376, 378; *Ex parte Knott*, 11 Ves. 617; 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (u); *Id.* § 12; *St. John v. Holford*, 1 Ch. Cas. 97; 4 Kent, Comm. Lect. 58, p. 185 (4th edit.).

² *Demandray v. Metcalf*, Prec. Ch. 419, 420; S. C. 2 Vern. 691, 698; 1 Eq. Abr. 324, pl. 4; *Gilb. Eq. R.* 104; *Jones v. Smith*, 2 Ves. Jr. 378, 379; *Vanderzee v. Willis*, 3 Bro. Ch. R. 21; *Adams v. Claxton*, 6 Ves. 229; *Anon.* 2 Vern. R. 177; 2 Fonbl. Eq. B. 3, ch. 1, § 10; 2 Kent, Comm. Lect. 40, p. 584 (3d edit.); *Jarvis v. Rogers*, 15 Mass. R. 389.

³ *Ibid.*; 2 Fonbl. Eq. B. 3, ch. 1, § 11; 4 Kent, Comm. Lect. 58, p. 175, 176 (4th edit.). As to the general doctrine of tacking, in cases of mortgages of real estate, see *ante*, § 412 to 421.

though it is applied with some modifications in the equity jurisprudence of England. In the civil law, the mortgagor or pledgor could not redeem, without discharging all the other debts which he then owed to the pledgee; with a saving, however, in favor of the rights of other creditors and purchasers.¹

§ 1035 *a*. We have already had occasion to consider the doctrine of tacking mortgages, when one of several incumbrancers has acquired the legal estate.² But in cases of mortgages, other questions, as to relative priorities and titles to payment, often arise between different merely equitable incumbrancers. In such cases, if a second equitable incumbrancer, without notice of a prior incumbrance, has by his diligence acquired a better equity, he will be entitled to be first paid. A better equity is thus acquired, when the legal estate, being outstanding in a trustee, a second incumbrancer, without notice of a prior incumbrance, takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take.³ Thus, for example, a declaration of trust of an outstanding term, accompanied by a delivery of the deeds, which create and continue the term, will give a better equity than a mere declaration of trust to a prior incumbrancer.⁴ So, where a second equitable incumbrancer has given notice to the trustees, in whom the legal estate is vested, he will thereby acquire a priority over a prior incumbrancer, who has omitted to give such notice.⁵ So, where the same equitable interest has been assigned by the assignor to different independent assignees, he who first gives notice of his title to the legal holder of the interest will thereby acquire a priority of right over the others, although his assignment be subsequent in date, provided

¹ *Ante*, § 415, note (1); 1010, and note (2); 4 Kent, Comm. Lect. 58, p. 175, 176 (4th edit.); Cod. Lib. 8, tit. 27, l. 1; Heinecc. Elem. P. and P. 4, § 46. In regard to the liens, and charges, and the modes of enforcing them in equity, see *post*, § 1215, 1216, 1216 *a*, 1217, &c., 1230, 1244 to 1253. In regard to the time within which a bill to foreclose a mortgage, or to redeem a mortgage, must be brought, see *ante*, § 55 *a*; 1028 *a*, 1028 *b*; *Post*, § 1520, 1521; Story on Equity Plead. § 503, 751 to 760; *White v. Parnter*, 1 Knapp, R. 228, 229.

² *Ante*, § 412 to 420.

³ *Ante*, § 421 *a*. But see *Muir v. Schenectady*, 3 Hill, N. Y. R. 238; *Davies v. Austen*, 1 Ves. Jr. R. 248; *Story on Confl. of Laws*, § 395; *James v. Marcy*, 2 Cowen, R. 246.

⁴ *Foster v. Blackstone*, 1 Mylne & Keen, 297; *Ante*, § 421 *a*; *Id.* § 399, note (1); *Stanhope v. Earl Verney*, 2 Eden, R. 81.

⁵ *Ibid.*

that at the time of taking it he had no notice of the prior assignments.¹ And it has been held, that it makes no difference, in cases of different assignments, as to this priority of title acquired by notice under such assignments, whether the interest of the

¹ *Timson v. Ramsbottom*, 2 Keen, R. 35 ; *Dearle v. Hall*, 3 Russ. R. 1 ; *Loveridge v. Cooper*, 3 Russ. R. 30 ; *Meux v. Bell*, 1 Hare, Ch. R. 73 ; *Foster v. Cockrell*, 9 Bligh, R. 332, 375, 376. Lord Lyndhurst, in delivering his opinion in the House of Lords, on this occasion, said : “ This was a question of priority between two equitable incumbrancers, — a question whether the subsequent incumbrancer of the equity, having given notice to the trustees of the fund, was entitled to priority over the former incumbrancer. Now, that question has been settled after much deliberate discussion, in the case of *Dearle v. Hall*, and *Loveridge v. Cooper*. These two cases were argued before Sir Thomas Plumer, as Master of the Rolls, with great learning and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding, that, in cases of this description, the party, who gave notice to the trustees, was entitled to the priority. And without adverting to the particular facts of those cases, the principle upon which the decisions were founded was this, that if a contrary doctrine were to prevail, it would enable a *cestui que trust* to commit a fraud ; he might assign his interest first to one and then to a second incumbrancer, and that second incumbrancer would have no opportunity, by any communication with the trustees, of ascertaining whether or not there had been a prior assignment of the interest. There was also another principle upon which he decided that case, which was this, that a party, till he gives notice to the trustee, has not done everything necessary to complete his title. In such cases it is necessary for the parties to do everything in their power. Further than that he assigns as an additional reason, that, until notice was given to the trustees, they did not in fact become trustees for the assignee. It was upon these distinct grounds, that he laid down, as a general rule, that in case of an equitable assignment, the party giving notice to the trustees, although he was the second incumbrancer, was entitled to priority if the former incumbrancer had given no such notice. These cases afterwards came before me, when I had the honor of presiding in the Court of Chancery, and they were again argued before me with great ability and learning. I took time to consider the judgment on those occasions, and I was satisfied, after deliberate consideration, that the judgment pronounced in each of those cases was correct, and that it was my duty to affirm those judgments. Now, the principle of those authorities applies directly to the present case. There are two incumbrancers of an equitable interest ; the latter gave notice to the trustees ; the former neglected to do so. The Master of the Rolls, Sir John Leach, when this case came before him, was of opinion, in conformity with the decisions already pronounced, that the notice gave to the second incumbrancer a prior right ; and under these circumstances, I think the decision so pronounced upon these principles by the Master of the Rolls, was a correct decision, and that your lordships will be disposed to affirm the judgment ; and as the case has already been decided, after deliberate argument, this judgment ought to be affirmed with costs.” *Ante*, § 391, § 421 a ; *Post*, § 1047, 1057. See *Langton v. Horton*, 1 Hare, R. 549, 560, 562 ; [* *Lee v. Howlett*, 2 Kay & J. 531.]

assignor be vested or contingent, present or reversionary.¹ [* But it has been sometimes held that this doctrine does not apply to real estate, or to an equitable interest in chattels real.² But in a later case,³ full effect was given to the prior notice of a subsequent assignment of an equitable interest in estate both real and personal, which was of the nature of a chose in action; and this seems to be the present rule of the English law upon the subject.⁴

§ 1035 *b*. It has often been questioned whether the interest of the mortgagor or pledgor of personal property is liable to attachment and levy of execution. But in a recent case in New Jersey a very sensible view is taken of the question. It is there said that it seems that goods pledged or leased by the defendant in execution may be levied upon, subject to the rights of the pawnee or lessee. And without deciding the absolute rights of the parties at law, the learned chancellor here declared, that the claim of the execution creditor is clearly good in equity, and will be there recognized and enforced.⁵]

§ 1035 *c*. Questions often arise as to the point, when and under what circumstances a mortgage is deemed to be extinguished. Undoubtedly, by our law, the satisfaction of the principal debt by payment, or otherwise, will be deemed in equity an extinguishment of the mortgage, unless there is an express or implied contract for keeping alive the original security.⁶ By the Dutch law, it seems that the mortgage is extinguished, unless there is an express contract for keeping it alive.⁷ An extinguishment of the debt will also ordinarily take place, where the mortgagee becomes also absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal.⁸ The rule, how-

¹ *Dearle v. Hall*, 3 Russ. R. 1; *Foster v. Cockerell*, 9 Bligh, R. N. S. 378; *Foster v. Blackstone*, 1 Mylne & K. 297, 306, 307; *Etty v. Bridges*, 3 Younge & Coll. N. R. 486, 492; *Ante*, § 421 *a*.

² [* *Wiltshire v. Rabbits*, 14 Simons, 76. *Lee v. Howlett*, *supra*.

³ *Consolidated Investment & Ins. Co. v. Riley*, 5 Jur. N. S. 1283. See *Scott v. Lord Hastings*, 5 Jur. N. S. 240.

⁴ *Foster v. Cockerell*, 9 Bligh, 332, S. C. *Foster v. Blackstone*, 1 Mylne & K. 297; *Kekewich v. Manning*, 1 De G. M. & G. 176.

⁵ *Mechanics' Building & Loan Ass. v. Conover*, 1 McCarter, 219.]

⁶ *Chester v. Willis*, Ambler, R. 246; *Compton v. Oxendon*, 2 Ves. Jr. 264; 2 Fonbl. Eq. book 2, ch. 6, § 8.

⁷ *Wilkinson v. Simson*, 2 Moore, Priv. Coun. R. 275.

⁸ *James v. Marcy*, 2 Cowen, R. 246; *Jackson v. De Witt*, 6 Cowen, R. 310; *Pelletrave v. Jackson*, 11 Wend. R. 110; *Wade v. Howard*, 6 Pick. R. 492; *St.*

ever, is not inflexible, and may be controlled by the express or implied intention of the parties; and where it is manifestly for the interest of the person in whom both the legal and equitable titles unite to keep the incumbrance alive, there courts of equity will imply an intention to keep it alive, unless the other circumstances of the case repel such a presumption.¹ The same doctrine, with the like qualifications, will apply to the case where an assignee of a mortgage purchases the equity of redemption, or the assignee of an equity of redemption purchases and takes a conveyance of the mortgage.²

[* § 1035 *d*. And when the mortgage debt is once paid off, the security is so effectually extinguished, that it cannot be made a continuing security for further advancements. But where that is attempted to be done by the agreement of the parties, a court of equity will not aid the mortgagor or one who takes a conveyance from him, with knowledge of the facts, to obtain a surrender of the mortgage deed or a release of the title by the mortgagee.³]

§ 1035 *e*. Questions have also arisen as to what shall or ought to be deemed a waiver or extinguishment of a mortgage upon personal property, by taking other security therefor. It has been held, that a creditor, having a mortgage for part of his debt upon the funds of his debtor, does not necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage upon the same property for his whole debt, or by taking security on the same fund for another debt due to him either solely or jointly with another creditor.⁴ [And it has also been decided that a mortgagee of personal property may commence a suit upon the claim secured by the mortgage, and attach other property thereon, without being deemed to have waived or relinquished his original security.⁵]

Paul's v. Viscount Dudley & Ward, 15 Ves. 173; *Forbes v. Moffatt*, 18 Ves. 390; *Gardner v. Astor*, 3 Johns. Ch. R. 53.

¹ *Ibid*.

² *Ibid*.

³ [* *Joslyn v. Wyman*, 5 Allen, 62.]

⁴ *Milne v. Walton*, 2 Younge & Coll. New R. 354; *Burdett v. Clay*, 8 B. Monroe, 287; *Hill v. Beebe*, 3 Kernan, 556.

⁵ *Thurber v. Jewett*, 3 Michigan, 295. See *Butler v. Miller*, 1 Const. 496; 1 Denio, 412.

CHAPTER XXVIII.

ASSIGNMENTS.

[* § 1036. Assignments in trust for creditors.

§ 1036 *a.* The assent of creditors presumed.

§ 1036 *b.* Such assignments revocable before such assent.

§ 1037. Courts of equity administer such trusts.

§ 1037 *a.* Grounds on which general assignments for creditors held void.

§ 1038. The assignee takes only the interest of assignor.

§ 1039. Equity recognizes the assignment of *choses in action*.

§ 1040. And of contingent and future interests.

§ 1040 *a.* So also of future acquisitions, as security.

§ 1040 *b.* By continental law, *choses in action* assignable.

§ 1040 *c.* Contingent interests and expectancies the subjects of contract.

§ 1040 *d.* Such assignments not enforced in favor of volunteers.

§ 1040 *e.* Emoluments, or salary, of office, not assignable.

§ 1040 *f.* But pensions are assignable.

§ 1040 *g.* Questionable whether pensions dependent upon good-will are assignable.

§ 1040 *h.* Right of action, in equity, or in tort, not assignable.

§ 1041. Illustration of the subject by reference to bailments.

§ 1042. Mere bailment gives no right of action to third party.

§ 1043. So of a draft, or bill, unaccepted.

§ 1044. But such assignments are enforced in equity.

§ 1045. Assignments for benefit of creditors, assented to, irrevocable.

§ 1046. But this must be notified to the assignee.

§ 1046 *a.* Voidable assignments leave property liable to attachment until express contract.

§ 1047. No particular form required, but notice important.

§ 1047 *a.* Assignment of debt carries securities.

§ 1048. Definition of champerty and maintenance.

§ 1048 *a.* One may aid in suit where he believes he is interested.

§ 1049. Equity will not encourage one to aid in a suit for a share of the avails.

§ 1050. Equitable interests, in action, may be the subject of sale.

§ 1051. Such interests may be transferred during the pendency of a suit for their recovery.

§ 1052. *Bonâ fide* assignments of rights of action not illegal.

§ 1053. Nor will it be illegal if suits pending are also assigned.

§ 1054. But it is doubted if the vendee can take the risk of the past litigation.

§ 1055. Future freight, or the avails of a voyage, assignable.

§ 1056. The interests of an assignee recognized at law.

§ 1057. But he may sue in his own name, in equity.

§ 1057 *a.* If no impediment, at law, that is the proper tribunal.

§ 1057 *b.* In cases of unliquidated damages, remedy at law more appropriate.

§ 1057 *c.* There is now no legal impediment to the assignment of rights of action, or pending suits, and the equitable interest of the assignee will be recognized in courts of law.]

§ 1036. IN the next place, let us pass to the consideration of ASSIGNMENTS of real and personal property upon special trusts.

The most important and extensive of this class of trusts is that which embraces general assignments by insolvents and other debtors for the discharge of their debts, sometimes with priorities and preferences of particular creditors, and sometimes with an equality of rights among all the creditors. The question of the validity of such conveyances, and under what circumstances they are deemed fraudulent, or *bonâ fide*, has been already, in some measure, considered under the head of constructive fraud.¹ In general, it may be stated, that such priorities and preferences are not deemed fraudulent or inequitable; and even a stipulation on the part of the debtor, in such an assignment, that the creditors taking under it shall release and discharge him from all their further claims beyond the property assigned, will (it seems) be valid, and binding on such creditors.²

§ 1036 a. In order to entitle the creditors, named in a general assignment for the benefit of creditors, to take under it, it is not necessary that they should be technical parties thereto.³ It will be sufficient, if they have notice of the trust in their favor and they assent to it; and, if there be no stipulation for a release, or

¹ *Ante*, § 349, 369, 370, 378, 379; *Estwick v. Caillaud*, 6 Term Rep. 420; *Holbird v. Anderson*, 5 T. Rep. 235; *Meux v. Howell*, 4 East, R. 1; *The King v. Watson*, 3 Price, R. 6; *Small v. Marwood*, 9 B. & Cressw. 300; *Pickstock v. Lyster*, 3 M. & Selw. 371; *Marbury v. Brooks*, 7 Wheaton, R. 556; 11 Wheat. R. 73; *Wilkes v. Ferris*, 5 Johns. Rep. 335; *Hyslop v. Clarke*, 14 Johns. R. 459; *Lippencott v. Barker*, 2 Binn. R. 174; *Halsey v. Whitney*, 4 Mason, R. 206, 227 to 230.

² *Ante*, § 371; *Halsey v. Whitney*, 4 Mason, Cir. R. 206; *Spring v. S. Car. Ins. Co.* 8 Wheat. Rep. 268; *Pearpont v. Graham*, 4 Wash. Cir. R. 232; *Brashear v. West*, 7 Peters, R. 608; *Heydock v. Stanhope*, 1 Curtis, C. C. 471; *Wheeler v. Sumner*, 4 Mason, Cir. R. 183. The decisions in New York are against the validity of an assignment with such a clause of release. See *Hyslop v. Clarke*, 14 Johns. R. 459; *Austin v. Bell*, 20 Johns. R. 442; *Seaving v. Brinkerhoff*, 5 Johns. Ch. R. 329; *Wakeman v. Groner*, 4 Paige, R. 23; S. C. 11 Wend. R. 187; *Seldon v. Dodge*, 4 Denio, 217; *Lentillon v. Moffat*, 1 Edw. Ch. R. 451; *Thomas v. Jenks*, 5 Rawle, 221; *Hennessey v. Western Bank*, 6 Watts & Serg. 301; *In re Wilson*, 4 Barr. 430. And see *Stewart v. Spenser*, 1 Curtis, C. C. 166; *Miller v. Conklin*, 17 Geo. 430. See, also, *Ingraham v. Wheeler*, 6 Conn. 277.

³ *New England Bank v. Lewis*, 8 Pick. 113; *Halsey v. Whitney*, 4 Mason, R. 206; *Smith v. Wheeler*, 1 Vent. R. 128; 2 Keble, R. 564; *Brashear v. West*, 7 Peters, R. 608; *Garrard v. Lord Lauderdale*, 3 Sim. 1. [See *Simmonds v. Pallas*, 2 Jones & Lat. 489, where *Gerrard v. Lord Lauderdale* is commented upon.] *Acton v. Woodgate*, 2 Mylne & Keen, 492; *Lane v. Husband*, 14 Simons, R. 656.

any other condition in it, which may not be for their benefit, their assent will be presumed, until the contrary appears.¹ Such a general assignment, *bonâ fide* made by the debtor, and assented to by the assignee, will be deemed a valid conveyance, founded upon a valuable consideration, and good against creditors, proceeding adversely to it by attachment or seizure in execution of the property conveyed thereby; at least, unless all the creditors, for whose benefit the assignment is made, repudiate it.² Where the creditors are named in the assignment as parties, and they are required to execute it, before they can take under its provisions, there, they must signify their assent in that mode; otherwise they cannot take under the instrument.³ But where they are not required to be parties to the instrument, there they may take the benefit of the trust by notice to the trustee within the time prescribed therefor, if any; and if none is prescribed, then within a reasonable time, and before a distribution is made of the property.⁴ Where a specific time is prescribed for the creditors to come in and assent to the assignment, as parties thereto, or otherwise, there, they must comply strictly with the condition, or they will be excluded from the benefit of the trust; unless, indeed, by reason of absence from the country, or some other cause, any creditor has not, within the time prescribed, had any knowledge of the existence of the assignment.⁵

¹ *New England Bank v. Lewis*, 8 Pick. 113; *Halsey v. Whitney*, 4 Mason, R. 206; *Egberts v. Wood*, 3 Paige, R. 517; *Nicoll v. Mumford*, 4 Johns. Ch. R. 522; *Ante*, § 972; *Post*, § 1045; *Small v. Marwood*, 9 Barn. & Cressw. 300. But, *contra*, *Russell v. Woodward*, 10 Pick. R. 408. And see *Brewer v. Pitkin*, 11 Pick. 298; *Id.* 75; *Todd v. Bucknam*, 2 Fairf. 41; *Id.* 193; *Fall River Iron Works v. Croade*, 15 Pick. 11.

² *Small v. Marwood*, 9 Barn. & Cressw. 300; *Halsey v. Whitney*, 4 Mason, R. 206; *Wilt v. Franklin*, 1 Binn. R. 502, 517; *Marbury v. Brooks*, 7 Wheat. 556; 11 Wheat. R. 78; *Pickstock v. Lyster*, 3 Maule & Selwyn, 371; *Dey v. Dunham*, 2 Johns. Ch. R. 182; *Nicoll v. Mumford*, 4 Johns. Ch. R. 522. Where a debtor conveyed all his property to trustees for his creditors *in consideration of a license and release* granted to him by the deed; it was held that a creditor could not have the benefit of it, who, having notice of the deed shortly after its execution, seven years after the death of the debtor, filed a bill to be allowed to execute it, for the debtor could not have the benefit of the consideration. *Lane v. Husband*, 14 Simons, R. 656.

³ *Gerrard v. Lord Lauderdale*, 3 Sim. R. 1. See *Simmonds v. Pallas*, 2 Jones & Lat. 489.

⁴ See *Halsey v. Whitney*, 4 Mason, R. 206; *Acton v. Woodgate*, 2 Mylne & Keen, 492; *Post*, § 1036 *b*; 1045.

⁵ *Phœnix Bank v. Sullivan*, 9 Pick. 410; *De Caters v. Le Ray de Chaumont*, 2 Paige, R. 490.

§ 1036 b. It is proper to add, that in all such cases of general assignments, voluntarily made by the debtor for the benefit of creditors, whether they are specially named in the instrument, or only by a general description, if such creditors are not parties thereto, and have not executed the same, the assignment is deemed, in equity as well as at law, to be revocable by the debtor, except as to creditors who have assented to the trust, and given notice thereof to the assignee. For, until such assent and notice, the assignment is treated, as between the debtor and the assignee, as merely directing the mode in which the assignee shall and may apply the debtor's property for his own benefit.¹

§ 1037. The trusts, arising under general assignments for the benefit of creditors, are, in a peculiar sense, the objects of equity jurisdiction. For, although at law there may, under some circumstances, be a remedy for the creditors to enforce the trusts, that remedy must be very inadequate, as a measure of full relief. On the other hand, courts of equity, by their power of enforcing a discovery and account from the trustees, and of making all the creditors, as well as the debtor, parties to the suit, can administer entire justice, and distribute the whole funds in their proper order among all the claimants, upon the application of any of them,² either on his own behalf, or on behalf of himself and all the other creditors. This remedy is ordinarily resorted to by the govern-

¹ *Gerrard v. Lord Lauderdale*, 3 Sim. 1. See *Simmonds v. Pallas*, 2 Jones & Lat. 489; *Wallwyn v. Coutts*, 3 Meriv. R. 767; *S. C.* 3 Sim. R. 14; *Page v. Broom*, 4 Russ. R. 6; *Acton v. Woodgate*, 2 Mylne & Keen, 492; *Ante*, § 972 and note; *Post*, § 1045, 1046, 1196.

² *Hamilton v. Houghton*, 2 Bligh, R. 171, 189; *Brashear v. West*, 7 Peters, R. 608. A question has arisen under such assignments, whether they take effect from the moment of their execution, and before the creditors have assented thereto, or only from the time of such assent. It has been decided that they take effect from the time of their execution, upon the ground that, being for the benefit of creditors, their assent is presumed until the contrary is shown. See *Marbury v. Brooks*, 7 Wheat. R. 556; 11 Wheat. R. 78; *Smith v. Wheeler*, 1 Vent. 128; *Small v. Marwood*, 9 B. & Cres. 300; *Nicoll v. Mumford*, 4 Johns. Ch. R. 529; *Ante*, § 972. A question has also been made, whether such an assignment is operative, unless all the trustees should assent thereto. But it has been decided, that unless the contrary is provided for in the assignment, the assignment is good, and vests the property in the assenting trustees, although the other trustees do not assent. *Ibid.*; *Neilson v. Blight*, 1 Johns. Cas. 205; *Moses v. Murgatroyd*, 1 Johns. Ch. R. 119, 129; *Shepherd v. McEvers*, 4 Johns. Ch. R. 136; *Duke of Cumberland v. Coddington*, 3 Johns. Ch. R. 261; *Weston v. Barker*, 12 Johns. R. 276.

ment, in order to enforce its own right of priority and preference in payment of the debts due to it against the assignees.¹ Sureties on custom-house bonds, paid by them, are also entitled to the like remedy, by way of substitution, to the government, by the express provisions of law.²

[* § 1037 *a*. The question of the validity of general assignments for the benefit of creditors is becoming of less importance than formerly, in many of the American States, by reason of statutory provisions controlling the disposition of the estate of insolvents. But they are still recognized, in many of the States, when not so conceived as to be a fraud upon the rights of creditors. It was decided in a late case³ in Vermont, that an assignment for the benefit of creditors, if made with the intent, on the part of the assignor, to hinder and prevent a particular creditor from getting his pay, either from the assigned property or otherwise, except at the pleasure of the assignor, is fraudulent and void, as against such creditor, notwithstanding the assignee accepted and acted under the assignment in good faith and in ignorance of such purpose on the part of the assignor. The validity of such assignments is considerably discussed in a recent case⁴ in New Jersey.]

§ 1038. It may also be necessary, in many cases, for the purposes of a due distribution, to order a sale of the property; to take an account of, and to adjust the conflicting claims of different creditors; to direct the order of preferences and payment of the various debts, according to their respective priorities, and to marshal the various funds on which particular creditors may have a lien, so as to secure the due proportion of the assets to each creditor, according to his particular rights.⁵ For all these purposes, (and others might be mentioned,) courts of equity are the only tribunals competent to afford suitable means of relief. And where trusts are created by general assignments in favor of creditors, with or without any limitation as to the time of their assent thereto, courts of equity will, upon a suitable application, require the creditors, within a reasonable time, to come in and signify

¹ *United States v. Howland*, 4 Wheaton, R. 108; *United States v. Hunter*, 5 Mason, R. 62; S. C. 5 Peters, R. 173.

² Act of 1799, ch. 128, § 65.

³ [* *Stickney v. Crane*, 35 Vt. R. 89.

⁴ *Fairchild v. Hunt*, 1 McCarter, 367.]

⁵ See *United States v. Howland*, 4 Wheat. R. 108, 115; *Ante*, ch. 12, § 633 to 645.

their assent; or, otherwise, they will be excluded from all the benefit of the trusts.¹ Assignees under general assignments, such as assignees in cases of bankruptcy and insolvency, take only such rights as the assignor or debtor had at the time of the general assignment; and consequently a prior special assignee will hold against them without giving notice thereof.²

§ 1039. In regard to particular assignments upon special trusts, there is little to be said which is not equally applicable to all cases of jurisdiction exercised over general trusts. But courts of equity take notice of assignments of property, and enforce the rights growing out of the same, in many cases, where such assignments are not recognized at law as valid or effectual to pass titles. It is a well-known rule of the common law, that no possibility, right, title, or thing in action can be granted to third persons.³ For it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would, in effect, be transferring a lawsuit to a mere stranger.⁴ Hence, a debt, or other *chose in action*, could not be transferred by assignment, except in case of the King; to whom and by whom, at the common law, an assignment of a *chose in action* could always be made; for the policy of the rule was not supposed to apply to the King.⁵ So strictly was this doctrine construed, that it was even doubted whether an annuity was assignable,⁶ although assigns were mentioned in the deed creating it.⁷ And at law, with the exception of negotiable

¹ *Dunch v. Kent*, 1 Vern. 260, 319; 1 Eq. Abridg. 147, pl. 12; *Ante*, § 1036 a.

² *Muir v. Schenck*, 3 Hill, R. 228. See, also, *Murray v. Lylburn*, 2 Johns. Ch. R. 441, 443; *Brown v. Heathcote*, 1 Atk. 160, 162; *Mitford v. Mitford*, 9 Ves. 87, 100; *Jewson v. Moulson*, 2 Atk. R. 417, 420; *Morrall v. Marlow*, 1 P. Williams, R. 459; *Post*, § 1228, 1229, 1411; 1 Deacon on Bank. ch. 13, § 3, p. 320, 321, edit. 1827; *Scott v. Surman*, Willes, R. 402, and the reporter's note; *Gladstone v. Hadwen*, 1 M. & Selw. R. 517, 526; Com. Dig. Bankrupt. D. 19; *Carvalho v. Burn*, 4 B. & Adolph. 382, 398; *Leslie v. Guthrie*, 1 Bingh. N. C. 697.

³ *Lampet's case*, 10 Co. R. 48 a; 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (g); Com. Dig. *Chancery*, 2 H.; *Thalhimer v. Brinckerhoff*, 3 Cowen, R. 623.

⁴ *Ibid.*; Co. Litt. 232 b, Butler's note (1); *Prosser v. Edmonds*, 1 Younge & Coll. 489; *Stafford v. Buckley*, 2 Ves. 101.

⁵ Co. Litt. 232 b, Butler's note; *Stafford v. Buckley*, 2 Ves. 177, 181; Com. Dig. *Assignment*, D; *Miles v. Williams*, 1 P. Will. 252; *United States v. Buford*, 3 Peters, R. 12, 30.

⁶ See *Arden v. Goodacre*, 10 Eng. Law & Eq. R. 468.

⁷ Co. Litt. 144 b, and Hargrave's note (1); Co. Litt. 232 b, Butler's note (1). But though a possibility or a contingent interest is not assignable at law, yet it is

instruments, and some few other securities, this still continues to be the general rule, unless the debtor assents to the transfer; but if he does assent, then the right of the assignee is complete at law, so that he may maintain a direct action against the debtor upon the implied promise to pay him the same, which results from such assent.¹

§ 1040. But courts of equity have long since totally disregarded this nicety.² They accordingly give effect to assignments of trusts, and possibilities of trusts, and contingent interests, and expectancies, whether they are in real or in personal estate, as well as to assignments of *choses in action*.³ Every such assignment is considered in equity, as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property into possession.⁴ Contingent rights and interests are transmissible and devisable. 1 Fonbl. Eq. B. 1, ch. 4, § 5, and notes (*g*) and (*p*). There are, as we have seen, and shall presently more fully see, certain interests which are not assignable; such as pensions and half-pay to support a party in future duties; because it would defeat a great public policy. *Ante*, § 294; *Post*, § 1040 *c*; *Davis v. Duke of Marlborough*, 1 Swanst. 79; *McCarthy v. Goold*, 1 B. & Beatt. 389; *Stone v. Lidderdale*, 2 Anst. R. 533. Upon similar grounds the assignment of the share in a prize, *pendente lite*, is void. *Stevens v. Bagwell*, 15 Ves. 139; *Ante*, § 297. See also, as to assignments, *pendente lite*, *Foster v. Deacon*, 6 Madd. 59; *Harrington v. Long*, 2 Mylne & Keen, R. 592; *Ante*, § 406, 907, 908, 1048 to 1055.

¹ *Ibid.*; 1 Madd. Ch. Pr. 434 to 437; 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*g*); *Tiernan v. Jackson*, 5 Peters, R. 597, 598; *Israel v. Douglas*, 1 H. Black. 239; *Williams v. Everett*, 14 East, 582; *Crowfoot v. Gurney*, 9 Bing. R. 372; *Hodgson v. Anderson*, 3 B. & Cressw. 842; *Baron v. Husband*, 4 B. & Adolph. 611. As between different assignees, *quære*, whether the second assignee without notice may not, by giving notice to the debtor first, acquire a priority. See *ante*, § 421 *a*; *Muir v. Schenck*, 3 Hill, 228.

² See *Buck v. Swasey*, 35 Maine, 52.

³ *Fearne on Conting. Rem.* by Butler, 548, 550 (7th edit.); *Burn v. Carvalho*, 4 Mylne & K. 690; *Warmstrey v. Tanfield*, 1 Ch. Rep. 29; *Goring v. Bickerstaff*, 1 Ch. Cas. 8; 1 Madd. Ch. Pr. 437; 1 Fonbl. Eq. B. 1, ch. 4, § 2, and note (*g*); *Wind v. Jekyll*, 1 P. Will. 573, 574; *Kimpland v. Courtney*, 2 Freem. R. 251; *Thomas v. Freeman*, 2 Vern. R. 563, and Raithby's note (2); *Wright v. Wright*, 1 Ves. R. 411, 412; *Mandeville v. Welch*, 5 Wheat. R. 277, 283; *Post*, § 1055; *Jones v. Roe*, 3 T. R. 93, 94. Per Lord Kenyon; *Stokes v. Holden*, 1 Keen, R. 145; *Prosser v. Edmonds*, 1 Younge & Coll. 481, 496; *Com. Dig. Chancery*, 2 H. Assignment; *Ante*, § 733, 1021; *Langston v. Horton*, 1 Hare, R. 554, cited; *Post*, § 1055. See *Trull v. Eastman*, 3 Metc. R. 121.

⁴ *Ibid.*; *Co. Litt.* 232 *b*, Butler's note; *Lord Carteret v. Paschal*, 3 P. Will. 199; *Duke of Chandos v. Talbot*, 2 P. Will. 603; 1 Madd. Ch. Pr. 434 to 437; *Wright v. Wright*, 1 Ves. R. 411, 412; *Com. Dig. Chancery*, 4 W. 1.

not ordinarily assignable at law;¹ and yet they may sometimes be assigned at law if coupled with some present interest.² So, at law, such rights and interests may pass by way of estoppel, by lease and release, or by fine.³ But the reach of this doctrine at law falls far short of that now entertained in equity.⁴ To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment.⁵ But courts of equity will support assignments not only of choses in action, and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not indeed as a present positive transfer operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*.⁶ Thus, for example, the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress, will be valid in equity, and will attach to the head-matter and oil when obtained.⁷

[* § 1040 a. The assignment of a mill and machinery, and all the additional, or substituted, machinery, as security for a loan, is valid; and the filing of the bill of sale, in the terms of the assignment, is a sufficient notice, under the Registration Act, requiring the schedule, or inventory, of the property to be filed; to all subsequent purchasers, or incumbrancers; and possession by the assignor is sufficient for the assignee, in order to protect his interests.⁸]

¹ *Mulhall v. Quinn*, 1 Gray, 105.

² *Shep. Touch.* 238, 239, 322; *Arthur v. Bokenham*, 11 Mod. R. 152; *Com. Digest, Assignment, A, c. 3*; *Emery v. Lawrence*, 8 Cush. 151; *Hartley v. Tapley*, 2 Gray, 565.

³ *Doe d. Christmas v. Oliver*, 10 B. & Cressw. 181; *Weate v. Lower*, Pollexf. R. 54; *Fearne on Conting. Rem. ch. 6, § 5*, p. 363, edit. 1831; *Bensley v. Burden*, 2 Sim. & Stu. 519.

⁴ *Post*, § 1040 b.

⁵ See *Lunn v. Thornton*, 1 Mann. Gr. & Scott, 379; *Petch v. Tutin*, 15 Meeson & W. 110; *Moody v. Wright*, 13 Metc. 17.

⁶ *Mitchell v. Winslow*, 2 Story, R. 630; *Calkins v. Lockwood*, 17 Conn. 154.

⁷ *Ibid.*; *Langton v. Horton*, 1 Hare, R. 549, 556, 557; *Post*, § 1055.

⁸ [* *Holroyd v. Marshall*, 6 Jurist, N. S. 931. The case of *Hope v. Hayley*, 5 El. & Bl. 845; 2 Jur. N. S. 486, is here discussed and approved, wherein it was held that, if the assignment of after-acquired property do not strictly operate as an assignment to pass the title, it will nevertheless be effective as a license, on the part of the assignor, for the assignee to take possession and hold the property as part of his security.]

§ 1040 *b*. In the civil law, and in the jurisprudence of the modern commercial nations of Continental Europe, there does not seem to have been any foundation for such an objection to the assignment of debts ; for all debts were from an early period allowed to be assigned, if not formally, at least in legal effect ; and for the most part, if not in all cases, they may now be sued for in the name of the assignee.¹ The Code of Justinian says,

¹ Pothier has stated the old French law upon this subject (which does not in substance probably differ from that of the other modern states of Continental Europe) in very explicit terms, in his Treatise on the Contract of Sale, of which an excellent translation has been made by L. S. Cushing, Esq. The doctrines therein stated are in many respects so nearly coincident with those maintained by our courts of equity, that I have ventured to transcribe the following passages from Mr. Cushing's work. "A credit being a personal right of the creditor, a right inherent in his person, it cannot, considered only according to the subtlety of the law, be transferred to another person, nor consequently be sold. It may well pass to the heir of the creditor, because the heir is the successor of the person and of all the personal rights of the deceased. But, in strictness of law, it cannot pass to a third person ; for the debtor, being obliged towards a certain person, cannot, by a transfer of the credit, which is not an act of his, become obliged towards another. The juriconsults have, nevertheless, invented a mode of transferring credits, without either the consent or the intervention of the debtor. As the creditor may exercise against his debtor, by a mandatary, as well as by himself, the action which results from his credit, when he wishes to transfer his credit to a third person, he makes such person his mandatary, to exercise his right of action against the debtor ; and it is agreed between them, that the action shall be exercised by the mandatary, in the name indeed of the mandator, but at the risk and on the account of the mandatary, who shall retain for himself all that may be exacted of the debtor in consequence of the mandate, without rendering any account thereof to the mandator. Such a mandatary is called, by the juriconsults, *Procurator in rem suam*, because he exercises the mandate, not on account of the mandator, but on his own. A mandate made in this manner is, as to its effect, a real transfer, which the creditor makes of his credit ; and if he receives nothing from the mandatary for his consent that the latter shall retain to his own use what he may exact of the debtor, it is donation ; if for this authority he receives a sum of money of the mandatary, it is a sale of the credit. From which it is established in practice, that credits may be transferred, and may be given, sold, or disposed of by any other title ; and it is not even necessary that the act which contains the transfer should express the mandate, in which, as has been explained, the transfer consists. The transfer of an annuity or other credit, before notice of it is given to the debtor, is what the sale of a corporeal thing is before the delivery ; in the same manner that the seller of a corporeal thing until a delivery remains the possessor and proprietor of it, as has been established in another place. So, until the assignee notifies the debtor of the assignment made to him, the assignor is not divested of the credit which he assigns. This is the provision of art. 108, of the Custom of Paris : 'A simple transfer does not divest,

Nominis autem venditio (distinguishing between the sale of a debt and the delegation or substitution of one debtor for another for the same debt) *et ignorante, vel invito eo, adversus quem actiones mandantur, contrahi solet.*¹ And Heineccius, after remarking that bills of exchange are for the most part drawn payable to a person or his order, says, that although this form be omitted, yet

and it is necessary to notify the party of the transfer, and to furnish him with a copy of it.' From which it follows, first, that before notice, the debtor may legally pay to the assignor, his creditor; and the assignee has no action; in such case, except against the assignor, namely, the action *ex empto, ut præstet ipsi heberi licere*; and, consequently, that he should remit to him the sum, which he is no longer able to exact of the debtor, who has legally paid the debt to the assignor. Second, that before notice, the creditors of the assignor may seize and arrest that which is due from the debtor, whose debt is assigned; and they are preferred to the assignee, who has not, before such seizure and arrest, given notice of the assignment to him; the assignee, in this case, is only entitled to his action against the assignor, namely, the action *ex empto* in order, that the latter *præstet ipsi habere licere*; and, consequently, that he should report to him a removal of the seizure and arrests, or pay him the sum, which, by reason thereof, he is prevented from obtaining of the debtor. Third, that if the assignor, after having transferred a credit to a first assignee, has the bad faith to make a transfer of it to a second, who is more diligent than the first, to give notice of his assignment to the debtor, the second assignee will be preferred to the first, saving to the first his recourse against the assignor. Though the assignee notifies to the debtor the assignment to him, the assignor, in strictness of law, remains the creditor, notwithstanding the transfer and notice; and the credit continues to be in him. This results from the principles established in the preceding article; but *quoad juris effectus*, the assignor is considered, by the notice of the transfer given to the debtor, to be divested of the credit which he assigns; and is no longer regarded as the owner of it; the assignee is considered to be so, and, therefore, the debtor cannot afterwards legally pay the assignor; and the creditors of the assignor cannot, from that time, seize and arrest the credit, because it is no longer considered to belong to their debtor. Nevertheless, as the assignee, even after notice of the transfer, is only the mandatary, though *in rem suam*, of the assignor, in whose person the credit in truth resides; the debtor may oppose to the assignee a compensation of what the assignor was indebted to him before the notice of the assignment, which, however, does not prevent him from opposing also a compensation of what the assignee himself owes him; the assignee being himself *non quidem ex juris subtilitate, sed juris effectus creditor.*" Pothier on Sales, by Cushing, n. 550, 555 to 559. The modern French law has gotten rid of the subtlety as to the suit being brought in the name of the assignor upon contracts generally; for it may now (whatever might have been the case formerly) be brought in the name of the assignee, directly against the debtor. See Troplong des Privil. et Hypoth. Tom. 1, n. 340 to 343; Code Civ. of France, art. 2112; Id. 1689 to 1692; Troplong de la Vente, n. 879 to 882, n. 906, 913.

¹ Cod. Lib. 8, tit. 42, l. 1; 1 Domat, B. 4, tit. 4, § 3, 4.

an indorsement thereof may have full effect, if the laws of the particular country respecting exchange do not specially prohibit it; because an assignment thereof may be made without the knowledge and against the will of the debtor; and he refers to the passage in the Code in proof of it.¹ But he adds, (which is certainly not our law,) that if the bill be drawn payable to the order of Titius, it is not to be paid to Titius, but to his indorsee. *Tunc enim Titio solvi non potest, sed ejus indorsatario.*² The same general doctrine as to the assignability of bills of exchange, payable to a party, but not to his order, is affirmed in the Ordinance of France of 1673 (art. 12), as soon as the transfer is made known to the drawee or debtor.³ Indeed, the like doctrine prevails now in France, not only in cases of bills of exchange, but of contracts generally; so that the assignee may now sue therefor in his own name after the assignment, subject, however, to all the equities subsisting between the parties before and at the time when the debtor has notice of the assignment.⁴

§ 1040 *c.* Contingent interests and expectancies may not only be assigned in equity, but they may also be the subject of a contract, such as a contract of sale, when made for a valuable consideration, which courts of equity, after the event has happened, will enforce.⁵ But until the event has happened, the party, con-

¹ Heinecc. de Camb. cap. 3, § 8; Id. cap. 3, § 21 to 25. Heineccius, in a note, says, that in Franconia and Leipsic, no assignment is of any validity, if the formula of its being payable to order is omitted. The present law of France is the same, so far as the general negotiability of bills is concerned, and to give them circulation, unaffected by any equities between the payee and the debtor. Pardessus, Droit Comm. Tom. 2, art. 339, p. 360; Delvincourt, Instit. Droit Comm. Tom. 1, Liv. 1, tit. 7, Pt. 2, p. 114, 115. Delvincourt says that the right of a simple bill (not payable to order) is transferable only by an act of transfer made known to the debtor. See also Merlin, Repert. Lettre et Billet de Change, § 4, 8, p. 196, 252 (edit. 1827).

² Heinecc. de Camb. cap. 2, § 8.

³ Juosse, sur l'Ordon. 1673, art. 30, p. 123. See also Story on Bills of Exchange, § 19; Greenleaf on Evid. § 172, 190.

⁴ Pardessus, Droit Com. Tom. 2, art. 313; Troplong de Priv. et Hypoth. Tom. 1; Troplong de la Vente, n. 879 to 913; Code Civil of France, art. 1689 to 1693; Id. art. 2112; Id. art. 1295; Loere, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, p. 342.

⁵ *Post*, § 1055; *Stokes v. Holden*, 1 Keen, R. 145, 152, 153; *Stone v. Lidderdale*, 2 Anst. 533; *Tunstall v. Boothby*, 10 Simons, R. 542, 549; *Wells v. Foster*, 8 Mees. & Welsb. 149; *Langton v. Horton*, 1 Hare, R. 549, 556, 557; *Trull v. Eastman*, 3 Metc. R. 121.

tracting to buy, has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property. He has not, strictly speaking, a *jus ad rem*, any more than a *jus in re*. It is not an interest in the property; but a mere right under the contract.¹ Indeed, the same effect takes place in such cases, if there be an actual assignment; for in contemplation of equity, it amounts, not to an assignment of a present interest, but only to a contract to assign, when the interest becomes vested.² Therefore a contingent legacy, which is to vest upon some future event, such as the legatee's coming of age, may become the subject of an assignment, or a contract of sale. So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such a case, if made *bond fide* for a valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract.³

¹ *Stokes v. Holden*, 1 Keen, R. 152, 153. See *Yates v. Madden*, 8 Eng. Law & Eq. R. 180; *Spooner v. Payne*, 10 Id. 202; *Carleton v. Leighton*, 3 Meriv. R. 667, 672, and the reporter's note (c).

² See *Purdew v. Jackson*, 1 Russ R. 1, 26, 44, 45, 47, 50.

³ *Hobson v. Trevor*, 2 P. Will. 191; *Beckley v. Newland*, 2 P. Will. 182; *Wethered v. Wethered*, 2 Sim. R. 183; 1 Fonbl. Eq. B. 1, ch. 4, § 2, notes (e), (g), (h); 1 Madd. Ch. Pr. 437. See *Trull v. Eastman*, 3 Metc. R. 121. Mr. Fonblanque has remarked: "A distinction appears to have been taken in *Wright v. Wright*, 1 Ves. 409, between assignments of a possibility of an inheritance, and assignments of a possibility of a chattel real. The distinction was, however, overruled; and the cases of *Beckley v. Newland*, and *Hobson v. Trevor*, were referred to by Lord Hardwicke, as conclusive upon the point. It is observable, that Lord Kenyon, C. J., in the case of *Jones v. Roe*, 3 Term. Rep. 88, put the case of an heir, dealing in respect of his hope of succession, as a void contract; it being a bare possibility, and not the subject of a disposition during the life of the ancestor; from which it may be inferred, that damages could not be recovered at law for non-performance of such a contract; and yet it appears, from the above cases of *Beckley v. Newland*, and *Hobson v. Trevor*, that such a contract would be decreed in equity, if for a valuable consideration. This, therefore, may be considered an instance, in which a court of equity will decree the specific performance of a contract, though damages could not be recovered at law for the non-performance of it." 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (h); *Ante*, § 1021. Of the doctrine stated in the text, some doubt may perhaps even now be entertained; for it has been held by very able judges, that the expectancy of an heir, presumptive or apparent, is not an interest or a possibility capable of being made the subject of an assignment or contract. *Carleton v. Leighton*, 3 Meriv. R. 671, 672; *Jones v. Roe*, 3 T. Rep. 93; *Harwood v. Tooke*, cited 1 Madd. Ch. Prac. 437; *Ibid*. 548

§ 1040 *d*. But, although such assignments are valid in equity, yet they will not generally be carried into effect in favor of mere volunteers; nay, not in favor of persons claiming under the consideration of love and affection, (such, for instance, as a wife or children,) against the heirs and personal representatives of the assignor, but only in favor of persons claiming for a valuable consideration.¹ And if the assignee of a chose in action is a mere nominal holder, and has no interest in the assigned chose in action, it has been held, that he is not entitled to sue in his own name in equity, but the suit should be brought in the name of the real party in interest.²

§ 1040 *e*. There are, however, certain cases, in which assignments will not be upheld either in equity or at law, as being against the principles of public policy. Thus, for example, an

(2d edit.); S. C. 2 Sim. R. 192. The language, however, of both of these cases seems susceptible of an interpretation consistent with the text, if we suppose the learned judges were referring to a contract or assignment, operating to convey an interest *in present*. Indeed, the language of Lord Eldon in *Carleton v. Leighton*, 3 Meriv. R. 667, 672, seems to admit, that a covenant to convey the expectancy of an heir might be good by way of contract to be enforced, when the estate descended to the heir; for, in reference to *Beckley v. Newland*, 2 P. Will. 182, and *Hobson v. Trevor*, 2 P. Will. 191, he said: "That the cases cited were cases of covenant, to settle or assign property, which should fall to the covenantor, where the interest, which passed by the covenant, was not an interest in the land, but a right under the contract." The same doctrine, as to the obligatory force of such a contract was fully recognized in *Wethered v. Wethered*, 2 Sim. 183; *Ante*, § 1021; *Post*, § 1055; *Laughton v. Horton*, 1 Hare, R. 549, 556, 557; *In re Ship Warre*, 8 Price, R. 269; *Douglass v. Russell*, 4 Sim. R. 529; S. C. 1 M. & Keen, 488.

¹ *Wright v. Wright*, 1 Ves. 412; 1 Fonbl. Eq. B. 1, ch. 4, § 2, notes (*g*), (*b*); *Whitefield v. Faussett*, 1 Ves. 391; *Ante*, § 706, 787, 788, 793 *a*, 973. See also *Collyear v. Countess of Mulgrave*, 2 Keen, R. 81, 98; *Collinson v. Pattrick*, 2 Keen R. 123, 134; *Stokes v. Holden*, 1 Keen, R. 145, 152, 153; *Doungsworth v. Blair*, 1 Keen, R. 795, 801, 802; *Ellis v. Nimmo*, 1 Lloyd & Goold's Reports, 333; *Holway v. Headington*, 8 Sim. R. 224; *Jones v. Roe*, 3 T. R. 63, 94; *Jefferys v. Jefferys*, 1 Craig & Phillips, 138, 181; *Ante*, § 433, and note (*g*), p. 409, § 706, 706 *a*, 787, 793 *b*, 973, 987; *Callaghan v. Callaghan*, 8 Clark & Finnel. 374.

² *Ante*, § 607 *a* to 607 *c*, 793 *a*, 973; *Field v. Maghee*, 5 Paige, R. 539; *Rogers v. The Traders' Ins. Co.* 6 Paige, R. 584, 597, 598. In this latter case, Mr. Chancellor Walworth seems to have entertained some doubt, whether an agent, effecting a policy in his own name for the benefit of other persons could sue in equity on the policy; or, at least, his language may be thought to lead to such a doubt. The point was not before him; for the real question was, Whether the persons in interest could sue in equity on such a policy in their own names; and it was very properly held that they could.

officer in the army will not be allowed to pledge or assign his commission by way of mortgage;¹ for his commission is an honorary personal trust. So, the full pay, or half-pay of an officer in the army or navy, is not, upon principles of public policy, assignable, either by the party, or by operation of law.² For officers, as well upon half-pay as full pay, are liable at any time to be called into service; and it has been well remarked, that emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country ought not to be taken from a state of poverty. And it has been added, that it might as well be contended, that the salaries of the judges, which are granted to support the dignity of the state and the administration of justice, may be assigned.³ The fact, that half-pay is intended in part as a reward for past services, does not, in any respect, change the application of the principle; for it is also designed to enable the party to be always in readiness to return to the public service, if he shall at any time be required so to do.⁴ The same doctrine has been applied to the compensation, granted to a public officer for the reduction of his emoluments, or the abolition of his office, who, by the terms of the grant, might be required to return to the public service. For, in such a case, the object of the government is to command a right to his future services, and to enable the party to perform the duties, with suitable means to support him.⁵ [But the right to the annuity awarded as compensation to a commissioner of bankruptcy, whose duties were abolished by law, passes to his assignee in insolvency, although the annuity depends upon the annuitant's making an affidavit of certain facts before each

¹ *Collyer v. Fallon*, 1 Turn. & Russ. 459. [But see *L'Estrange v. L'Estrange*, 1 Eng. Law & Eq. R. 153.]

² *Ante*, § 294, 1040, note (1); *Davis v. Duke of Marlborough*, 1 Swanst. R. 79; *McCarthy v. Goold*, 1 Ball & Beatt. 387; *Stone v. Lidderdale*, 2 Anst. R. 533. [But see *Price v. Lovett*, 4 Eng. Law & Eq. R. 110.]

³ Per Lord Kenyon, in *Flarty v. Odum*, 3 Term. R. 681; *Stone v. Lidderdale*, 2 Anst. R. 533; *Tunstall v. Boothby*, 10 Sim. R. 540; *Grenfell v. Dean of Windsor*, 2 Beavan, R. 544, 549; *Davis v. Duke of Marlborough*, 1 Swanst. R. 79.

⁴ *Stone v. Lidderdale*, 2 Anst. R. 533; *Lidderdale v. Duke of Montrose*, 4 Term R. 248; *Priddy v. Rose*, 3 Meriv. 102.

⁵ *Wells v. Foster*, 8 Mees. & Welsb. 149. See *Spooner v. Payne*, 10 Eng. Law & Eq. R. 207.

payment.¹ In like manner, the profits of a public office would seem, upon a similar ground of public policy, not to be assignable.²

§ 1040 *f*. But it has been thought, that a different principle is properly applicable to pensions, either for life, or during pleasure, which are granted purely for past services, or as mere honorary gratuities, without any obligation to perform future services; for it has been said, that as in such a case no future benefit is expected by the state, no public policy or interest is thwarted by allowing an assignment thereof.³ And this distinction has been strongly insisted upon on various occasions. But it may be fairly questioned, whether the public policy, in cases of pensions, is not thereby materially thwarted and overturned. The object of every such pension is, to secure to the party for his past services or honorable conduct a decent support and maintenance during his life, or during the pleasure of the government. It is essentially designed to be for the personal comfort and dignity of the party, and for the honor of the state, and to promote and encourage extraordinary exertions for the public service, on the part of all the citizens or subjects. To enable the party, therefore, to assign his pension, is to defeat the very purposes of the government, by enabling the assignee to have all the benefit of the bounty of the government, and to encourage, on the part of the pensioner, at once, indifference and profusion, as well as to expose him to all the evils of poverty. However this may be, the authorities seem strongly to support the right of assignment of pensions.

§ 1040 *g*. There seems still to be some doubt, as to another point connected with this subject; and that is, whether a compensation or pension, granted during pleasure, and not for any certain time, and revocable in its own nature, is properly the subject of an assignment, as being of too uncertain and fleeting a character to pass by assignment; for, although mere expectancies may properly pass by assignment, yet they must be of a substantial character, and not ordinarily of such a nature, as to rest in the pure dis-

¹ *Spooner v. Payne*, 10 Eng. Law & Eq. R. 202, where *Wells v. Foster* is distinguished.

² *Hill v. Paul*, 8 Clark & Finnel. 295, 307; *Palmer v. Bate*, 2 Brod. & Bingh. 673; *Davis v. Duke of Marlborough*, 1 Swanst. R. 79.

³ *Stone v. Lidderdale*, 2 Anst. R. 533; *Wells v. Foster*, 8 Mees. & Welsb. 149; *Tunstall v. Boothby*, 10 Sim. 549; *Ex parte Battine*, 4 Barn. & Adolph. R. 690. See *Feistel v. King's College*, 10 Beav. 491.

cretion of the party granting or withholding them from time to time, at his pleasure.¹ Upon this ground, the salary of an assistant parliamentary counsel for the treasury has been held to be not assignable.² A distinction has also been taken between the case

¹ Lord Kenyon, in *Flarty v. Oldum*, 3 Term R. 681, seemed to think the assignment of half pay would be void, on account of its being dependent upon the mere pleasure of the crown, and too uncertain to pass any interest therein by assignment. See also *The King v. The Lords Commiss. of the Treasury*, 4 Adolph. & Ell. R. 976; *Id.* 984; *Ex parte Ricketts*, 4 Adolph. & Ell. 999. The weight of authority seems, however, in favor of the assignability of half-pay. *Tunstall v. Boothby*, 10 Sim. R. 542, 549; *Wells v. Foster*, 8 Mees. & Welsb. R. 149. In this last case, Mr. Baron Parke said: "I concur in the opinion that this action is not maintainable, upon the ground that, on principles of public policy, the allowance granted to the defendant was not assignable by him. It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasible right, or whether it is payable only during pleasure; although I have a strong impression that it subsists only during the joint pleasure of the treasury and of Parliament, by which the fund for its payment is provided. On the other hand, even if it be payable only during pleasure, it appears to me, that it is not, therefore, in point of law, the less assignable, however little its value would be in consequence of its being liable to be withdrawn at any moment. But, viewing the matter on the ground of public policy, we are to look not so much at the tenure of this pension, whether it is held for life or during pleasure, as whether it is, in either case, such a one as the law ought to allow to be assigned. The correct distinction made in the cases on this subject is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. In such a case, the assignee acquires a title to it both in equity and at law, and may recover back any sums received in respect of it by the assignor, after the date of the assignment. But, where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

² *Cooper v. Reilly*, 2 Sim. R. 560. But military prize-money, although resting in the mere bounty of the crown, is held to be different in its nature and objects from military pay, and treated as a right of property, rather than as a personal pension or reward. *Alexander v. Duke of Wellington*, 2 Russ. & Mylne, 35; *Stevens v. Bagwell*, 15 Ves. 139, 152. In this last case, the Master of the Rolls (Sir William Grant) said: "The capture of the fort at Chinsurah, in July, 1781, was made by The Nymph, sloop of war, commanded by Lieutenant Stevens, under the orders of Sir Edward Hughes, and by a detachment of the East India Company's forces. If the captured effects had, after the death of Lieutenant Stevens, been condemned as prize to the captors, there can be no doubt, that his share would have passed by his will; as, though the property was not completely vested in the captors until condemnation, yet, after condemnation, it is by relation considered as theirs from the time of the capture. The captured effects being con-

of an assignment of the arrearages of full pay, or half-pay, or other compensation connected with the right to future services, and the case of an assignment of the future accruing pay, or half-pay, or other compensation ; as the right to the arrearages has become absolute, and the assignment thereof may not interfere with any public policy.¹ It seems, also, that the profits of a public office are not assignable, even for the benefit of creditors.²

§ 1040 *h*. So, an assignment of a bare right to file a bill in equity for a fraud, committed upon the assignor, will be held void, as contrary to public policy, and as savoring of the character of maintenance, of which we shall presently speak.³ So, a mere right of action for a tort is not, for the like reason, assignable.⁴ Indeed, it has been laid down as a general rule, that, where an equitable interest is assigned, in order to give the assignee a *locus*

demned to the crown, no right to any part of the produce can accrue to any one, except by the gift of the crown ; and as Lieutenant Stevens died before any gift was made, his will could have no direct operation upon the subject of that gift. The attention of the crown, in all cases of this kind, is to put what is in strictness matter of bounty upon the footing of matter of right. The service performed is thought worthy of reward ; and, though the party performing it died before payment, the claim of bounty from the crown is considered as transmissible to his representatives, in the same plight and condition as the claim for wages, or any other stipulated or legal remuneration of service. In such cases, the crown never means to exercise any kind of judgment or selection with regard to the persons to be ultimately benefited by the gift. The representatives, to whom the crown gives, are those who legally sustain that character. But the gift is made in augmentation of the estate, not by way of personal bounty to them. They take, subject to the same trusts, upon which they would have taken wages or prize-money, to which the party, from whom they claim, might have been legally entitled." Lord Brougham, in the former case, said : " Reference has been made to the case of *Stevens v. Bagwell* (15 Ves. 139), where that which was a matter of bounty is put upon the footing of a right. So far, to be sure, as the question regards the transmission of the right from the grantee, after it has once vested in him, he may sell or assign the bounty ; he may transmit it to his heir, or sue for it, and say it has become a matter of right, and is no longer bounty. But is there a shadow of pretence for asserting, that, as against the crown, or against trustees standing in the place of the crown, prize is a matter of right, and not of bounty ? Such a decision will be sought for in vain."

¹ *Tunstall v. Boothby*, 10 Sim. R. 542, 549 ; *Ellis v. Earl Grey*, 6 Sim. R. 214. See also *Greenfell v. Dean of Windsor*, 2 Beavan, R. 544, 549.

² *Hill v. Paul*, 8 Clark & Finnel. 295. But see *Arbuthnot v. Norton*, 5 Moore, P. C. 219 ; 10 Jurist, 145.

³ *Prosser v. Edmonds*, 1 Younge & Coll. 481 ; *Post*, § 1048.

⁴ *Gardner v. Adams*, 12 Wend. R. 297 ; *Dunklin v. Wilkins*, 5 Alabama, 199. See *McKee v. Judd*, 2 Kernan, 622.

standi in judicio, in a court of equity, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to overset a local instrument, or to maintain a suit.¹

¹ *Prosser v. Edmonds*, 1 Younge & Coll. 481, 496 to 499. In this case, Lord Abinger examined the doctrine at large, and said: "With respect to the question as to the validity of an assignment of a right to file a bill in equity, I must distinguish between this sort of case, and of the assignment of a chose in action or equity of redemption. It may be said, that the assignment of a mortgaged estate is nothing more than an assignment of a right to file a bill in equity. But the equity of redemption arises out of an interest, though only a partial interest. Courts of law and equity treat the mortgage as a mere security, and there is an interest left in the mortgagor, which he may assign. But, in a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me, that the right of the second assignee to make such a claim would be a question deserving of great consideration. My present impression is, that such a claim could not be sustained in equity, unless the party, who made the assignment, joined in the prayer to set it aside. In such a case, a second assignment is merely that of a right to file a bill in equity for a fraud; and, I should say, that some authority is necessary to show, that a man can assign to another a right to file a bill for a fraud committed upon himself." And, again: "The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this, Whether or not parties, who either become purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged, that an equitable, as well as a legal interest, may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, although he cannot proceed at law for that purpose. But, where an equitable interest is assigned, it appears to me, that, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. For instance, that a mortgagor, who conveys his estate in fee to a mortgagee, has in himself an equitable right to compel a reconveyance, when the mortgage-money is paid, is true. But that is a right reserved to himself by the original security; it is a right coupled with possession and receipt of rent, and he is protected so long as the interest is paid; and it does not follow, that the assignee of the mortgage and the mortgagee may not adjust their rights without the intervention of a court of equity. In the present case, it is impossible that the assignee can obtain any benefit from his security, except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. So, where a person takes an assignment of a bond, he has the possession; and, although a court of equity will

§ 1041. The distinction between the operation of assignments at law, and the operation of them in equity, may be very famil-

permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it. So other cases might be stated to show, that, where equity recognizes the assignment of an equitable interest, it is such an interest as is recognized also by third persons, and not merely by the party insisting on them. What is this but the purchase of a mere right to recover? It is a rule, — not of our law alone, but of that of all countries (see Voet. Comm. ad Pandect. Lib. 41, tit. 1, sect. 38), — that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle, that no encouragement should be given to litigation by the introduction of parties to enforce those rights, which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice. Mr. Girdlestone was so obliging as to furnish me with a case, that of *Wood v. Downes* (18 Ves. 120), in which it appears to me, that the principle laid down by Lord Eldon goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set aside certain conveyances, which, it was alleged, were obtained by the defendant, in consequence of his situation of solicitor to the plaintiffs, the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord Eldon, in decreeing relief, adopted not only the ground that the party was the solicitor of the plaintiffs, but that the transaction was contrary to good policy. He said: ‘The objection, therefore, is not merely that which flows out of the relation of attorney and client, but upon the fact, that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty’; and he accordingly decreed the conveyance to be set aside, on the ground of litigated title. Here the proceeding is the converse of that in *Wood v. Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if, under the present circumstances, Robert Todd had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts, therefore, I ought to refuse to establish the deed in their favor. But the case does not rest here. There is a short but useful statute, which it is proper to refer to, that of the 32d of Hen. VIII., ch. 9, which is a legislative rule on the subject, and consistent with general policy and the principles of courts of law and equity. Under the statute, if the person who parts with his title has not been in actual possession of the land within a year before the sale, he, as well as the buyer, is liable to the penal consequences of the act. I do not say, that that is precisely the case here, because the conveyance purports to contain an ulterior trust for the party assigning, and, therefore, an action could not be brought against him on the statute. At the same time, it is to be observed, that, from many cases in *Anderson and Coke*, it appears that courts of common law were favorable to actions on the statute, considering them to be highly beneficial, and not without good cause to be restrained. It has been the opinion of some learned persons, that the old rule of law, that a chose in action is not

ially shown by a few illustrations, derived from cases of bailments and consignments. In the common case, where money or other property is delivered by a bailor to B. for the use of C., or to be delivered to C., the acceptance of the bailment amounts to an express promise from the bailee to the bailor, to deliver or pay over the property accordingly. In such a case, it has been said, that the person, for whose use the money or property is so delivered, may maintain an action at law therefor against the bailee, without any further act or assent on the part of the bailee; for a privity is created between them by the original undertaking.¹ But of this doctrine some doubt may perhaps be entertained, unless there is some act done by the bailee, or some promise made by him, whereby he shall directly contract an obligation to such person to deliver the money or other property over to him; otherwise it would seem, that the only contract would be between the bailor and his immediate bailee.² But be this as it may, it is certain

assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone and the earlier reporters. Courts of equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there courts of equity will allow the assignee to stand in the right of assignor. This is not that case. Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found, which decides that such a right can be the subject of assignment, either at law or in equity." *Post*, § 1048, note (3).

¹ Story on Bailments, § 103; *Israel v. Douglass*, 1 H. Black. R. 242; *Bac. Abr. Bailment*, D.; *Farmer v. Russel*, 1 Bos. & Pull. 295; *Priddy v. Rose*, 3 Meriv. R. 86, 102; *Row v. Dawson*, 1 Ves. 331.

² See *Pigott v. Thompson*, 3 Bos. & Pull. 149; *Williams v. Everett*, 14 East, R. 582; *Yates v. Bell*, 3 Barn. & Ald. 643; *Grant v. Austen*, 3 Price, R. 58; *Tiernan v. Jackson*, 5 Peters, R. 597, 601; *Post*, § 1042, 1045; Story on Bailm. § 103; *Prosser v. Edmonds*, 1 Younge & Coll. 481, 496 to 499; *Lilly v. Hayes*, 5 Adolph. & Ellis, 548. See *ante*, § 972, 1036 b; *Post*, § 1196; Comyns's Digest, Action upon the Case on Assumpsit, B. 13. There is certainly some confusion in the cases in the books on this subject. Lord Alvanley, in *Pigott v. Thompson*, 3 Bos. & Pull. 149, seems to have thought, that if A. lets land to B., in consideration of which B. promises to pay the rent to C., the latter may maintain an action on that promise. But, he said, that his brothers thought differently. So in *Marchington v. Vernon*, cited in 1 Bos. & Pull. 101, note, Mr. Justice Buller is reported to have said, that if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it. Probably it will be found, upon a thorough examination of the cases, that the true principle, on which

that a remedy would lie in equity under the like circumstances, as a matter of trust; for it is laid down in a work of very high authority, "If a man gives goods or chattels to another upon trust, to deliver them to a stranger, chancery will oblige him to do it."¹

§ 1042. But if a remittance be made of a bill to a bailee to collect the amount, and also to pay the proceeds, or a part thereof, to certain enumerated creditors; there it has been held, that the mere receipt of the bill, and even the collecting of the contents, will not necessarily amount to such an appropriation of the money to the use of the creditors, as that they can maintain a suit at law for the same, if there are circumstances in the case which repel the presumption that the bailee agreed to receive, and did receive, the money for the use of the creditors.² For until such assent, express or implied, no action lies at law, any more than it would lie against a debtor without such assent, if a debt were assigned by a creditor, in favor of the assignee.³

§ 1043. So, if a draft or order is drawn on a debtor for a part or the whole of the funds of the drawer in his hands; such a draft does not entitle the holder to maintain a suit at law against the drawee, unless the latter assents to accept or pay the draft.⁴

they have proceeded, is, that, where the promise is construed to be made to A., for the use or benefit of B., A. alone can maintain an action thereon. But if there is promise in general terms, which may be construed to be made to B. through A., there, B. may maintain an action thereon. The cases of *Williams v. Everett*, 14 East, 582, and *Tiernan v. Jackson*, 5 Peters, R. 597, 601, contain the fullest expositions of the doctrine. See also the reporter's learned note (a) to *Pigott v. Thompson*, 3 Bos. & Pull. 149. See also *Martyn v. Hind*, Cowp. R. 437; *S. P. Lilly v. Hayes*, 5 Adolph. & Ellis, 548. In *Ex parte South*, 3 Swanst. R. 393, Lord Eldon said: "It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him; on the other hand, this doctrine has been brought into doubt, by some decisions in the courts of law, who require that the party receiving the order should in some way enter into a contract. That has been the course of their decisions, but is certainly not the doctrine of this court." See also *Fitzgerald v. Stewart*, 2 Sim. R. 333; *S. C.* 2 Russ. & M. 457; *Lott v. Morris*, 4 Sim. R. 609.

¹ Com. Dig. *Chancery*, 4 W. 5; *Id.* 2 A. 1; *Ante*, § 458, note (5). See, also, *Scott v. Porcher*, 3 Meriv. R. 658, 659.

² *Williams v. Everett*, 14 East, R. 582; *Yates v. Bell*, 3 Barn. & Ald. 643; *Grant v. Austen*, 3 Price, R. 58; *Tiernan v. Jackson*, 5 Peters, R. 597 to 601.

³ *De Bernales v. Fuller*, 14 East, R. 590, note; *Post*, § 1196.

⁴ *Mandeville v. Welch*, 5 Wheat. R. 277, 286; *Tiernan v. Jackson*, 5 Peters, R. 597 to 601; *Adams v. Claxton*, 6 Ves. 231.

The same principle will apply to a case, where an equitable (but not legal) interest in specific property, in the hands of a bailee or factor, is intended to be transferred by an assignment to creditors; or, where specific property is remitted on consignment for sale, with directions to apply the proceeds to the payment of certain specified creditors. In each of these cases, some assent to the appropriation, express or implied, by the bailee or consignee, must be established, to justify a recovery at law by the creditors.¹

§ 1044. But in cases of this sort, the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto.² The same principle would apply to the case of an assignment of a part of such debt.³ In each case, a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it.

§ 1045. In regard to the other class of cases, above suggested, namely, those where the question may arise of an absolute appropriation of the proceeds of an assignment or remittance, directed to be paid to particular creditors, courts of equity, like courts of law, will not deem the appropriation to the creditors absolute, until the creditors have notice thereof, and have assented thereto. For, until that time, the mandate or direction may be revoked, or withdrawn; and any other appropriation made by the consignor or remitter of the proceeds.⁴ The true

¹ *Ibid.*; *Williams v. Everett*, 14 East, 582; *Yates v. Bell*, 3 B. & Ald. 643; *Baron v. Husband*, 4 B. & Adolph. 611; *Ante*, § 1042, note.

² *Ante*, § 962, 973; *Ex parte South*, 3 Swanst. R. 393; *Lett v. Morris*, 4 Sim. R. 607; *Ex parte Alderson*, 1 Madd. R. 53; *Mandeville v. Welch*, 5 Wheat. R. 277, 286; *Tiernan v. Jackson*, 5 Peters, R. 598. See *Collyer v. Fallon*, 1 Turn. & Russ. R. 470, 475, 476; *Adams v. Claxton*, 6 Ves. 230; *Row v. Dawson*, 1 Ves. 331; *Priddy v. Rose*, 2 Meriv. R. 86, 102; *Morton v. Naylor*, 1 Hill, N. Y. Rep. 583; *Gibson v. Finley*, 4 Md. Ch. Dec. 75; *Bell v. London and Northwestern Railway*, 21 Eng. Law & Eq. 566.

³ *Ibid.*; *Smith v. Everett*, 4 Bro. Ch. R. 64; *Lett v. Morris*, 4 Sim. R. 607; *Morton v. Naylor*, 1 Hill, N. Y. Rep. 583; *Watson v. Duke of Wellington*, 1 Russ. & M. 602, 605.

⁴ *Scott v. Porcher*, 3 Meriv. R. 662. See also *Acton v. Woodgate*, 2 Mylne & Keen, 462; *Walwyn v. Coutts*, 2 Meriv. R. 707, 708; *S. C.* 3 Sim. R. 14; *Gerrard v. Lord Lauderdale*, 4 Russ. & Mylne, 451; *Gaskell v. Gaskell*, 2 Younge & Jerv. 502; *Maber v. Hobbs*, 2 Younge & Jerv. 327; *Ante*, § 972, and note; § 1036 a, 1036 b.

test, whether an absolute appropriation is made out, or not, depends upon the point, at whose risk the property is; and, until the creditor has consented, the property will clearly be at the risk of the assignor or remitter.¹ But if, upon notice, the creditors should assent thereto, and no intermediate revocation should have been made by the assignor or remitter; there, in equity, the assignee or mandatary will be held a trustee for the creditors, and they may maintain a bill to enforce a due performance of the trust. For, although the assignee or mandatary has a perfect right, in such a case, to refuse the trust; yet he cannot act under the mandate, and receive the proceeds, and hold them discharged from the trust, thus created, and still subsisting between the mandator and the creditors.² The property comes to his hands, clothed with the trust, by the act of parties, competent to create and establish it; and his assent is in no just sense necessary to give validity to it in equity. If, at the time of such assignment or remittance, the very arrangement and appropriation of the proceeds had been actually made between the assignor or remitter and the creditors, it would clearly bind the proceeds in the hands of the assignee or mandatary, subject to such appropriation, whether he assented to it or not.³ And it can make no just difference, that the arrangement is subsequently made by the same parties, as they still remain competent to enter into it.⁴

§ 1046. It is true, that, in every case, where a consignment or remittance is made, with orders to pay over the proceeds to a third person, the appropriation is not absolute; for it amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least, before any engagement is entered into by the mandatary with the third person, to execute it for his benefit; and it will be revoked by any prior disposition of the property, inconsistent with such execution.⁵ But if no revocation is made, and the mandate continues in full force, the trust, as such, con-

¹ Williams v. Everett, 14 East, R. 582; Tiernan v. Jackson, 5 Peters, R. 598.

² See Yates v. Bell, 3 Barn. & Ald. 643; *Ante*, § 1036 a, 1036 b.

³ See Fitzgerald v. Stewart, 2 Sim. R. 333; *Ante*, § 1044.

⁴ See Watson v. Duke of Wellington, 1 Russ. & Mylne, R. 602; Hassall v. Smithers, 12 Ves. 119. But see *Ex parte* Heywood, 2 Rose, R. 355.

⁵ Scott v. Porcher, 3 Meriv. R. 662, 664; Acton v. Woodgate, 2 Mylne & Keen, 492; *Ante*, § 972, 1036 a, 1036 b.

tinues for the benefit of such third person, who, after his assent thereto, notified to the mandatary, may avail himself of it in equity, without any reference to the assent or dissent of the mandatary upon such notice; for his receipt of the property binds him to follow the orders of his principal.¹

[* § 1046 *a*. And where the assignment is not made in conformity with the existing statutes, or the general laws of the State, and is consequently invalid, as to all creditors who choose to avoid it, the property assigned remains liable to process of foreign attachment, in behalf of the creditors of the assignor until a sufficient number and amount, to absorb the fund assigned, have expressly notified to the assignee, their assent to the provisions of the assignment on their behalf, and the assignee has made a valid contract to keep the same for them.²]

§ 1047. In order to constitute an assignment of a debt or other *chose in action*, in equity, no particular form is necessary. A draft drawn by A. on B., in favor of C., for a valuable consideration amounts (as we have seen) to a valid assignment to C. of so much of the funds of A. in the hands of B.³ So, indorsing and delivering a bond to an assignee for a valuable consideration amounts to an assignment of the bond.⁴ Indeed, any order, writing, or act, which makes an appropriation of a fund, amounts to an equitable assignment of that fund.⁵ The reason is, that the fund, being matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity.⁶ An assignment of a debt may be by parol, as well as by deed.⁷ As the assignee is generally entitled to all the remedies of the assignor, so he is generally subject to all the equities between

¹ *Hassall v. Smithers*, 12 Ves. 119, 122.

² [* *Merrill v. Inglesby*, 28 Vt. R. 150.]

³ *Ante*, § 1043; *Row v. Dawson*, 1 Ves. 332; *Crowfoot v. Gurney*, 9 Bing. R. 372; *Smith v. Everett*, 4 Bro. Ch. R. 64.

⁴ *Row v. Dawson*, 1 Ves. 332; *Ryall v. Rolles*, 1 Ves. 348, 375; *Townsend v. Windham*, 2 Ves. 6; 1 Madd. Ch. Pr. 434; *Ex parte Alderson*, 1 Madd. R. 53; *Burn v. Carvalho*, 4 Mylne & Craig, 690, 702; *Yeates v. Groves*, 1 Ves. Jr. 280, 281; *Ex parte South*, 3 Swanst. R. 393.

⁶ *Morton v. Naylor*, 1 Hill, N. Y. Rep. 583; *Burn v. Carvalho*, 4 Mylne & Craig, 690, 702.

⁶ *Clemson v. Davidson*, 5 Binn. R. 392, 398.

⁷ *Heath v. Hall*, 4 Taunt. R. 326 to 328; *S. C.* 2 Rose, R. 271; *Tibbets v. George*, 5 Adolph. & Ellis, 107, 115, 116.

the assignor and his debtor.¹ But, in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor; for, otherwise, a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignor before such notice.²

§ 1047 *a*. In cases of assignments of a debt, where the assignor has collateral security therefor, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties.³ Thus, for example, the assignee of a debt secured by a mortgage, will be held in equity entitled to the benefit of the mortgage.⁴ So, in equity, although not at law, if a debtor, having goods in the hands of his agent at a foreign port, sends a letter to his creditor C., promising to direct B. to deliver over the goods to D. as the agent of C. at the port, and while the letter is on its way to B. the debtor becomes bankrupt, the creditor will still be held entitled to the goods.⁵

§ 1048. It is principally in cases of assignments that courts of equity have occasion to examine into the doctrine of champerty and maintenance; and therefore, it may be here proper to glance at this important topic. Champerty (*campi partitio*) is properly a bargain between a plaintiff or a defendant in a cause, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense.⁶ Maintenance (of which champerty is a species) is properly an officious intermeddling in a suit, which no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.⁷ Each of these is deemed an offence against public

¹ 1 Madd. Ch. Pr. 435, 436; *Priddy v. Rose*, 3 Meriv. R. 86; *Coles v. Jones*, 2 Vern. 692; *Murray v. Lylburn*, 2 Johns. Ch. R. 441; *Post*, § 1057.

² *Foster v. Blackstone*, 1 M. & Keen, 297; *Timson v. Ramsbottom*, 2 Keen, R. 35; *Meux v. Bell*, 1 Hare, Ch. R. 73; *Ante*, § 421 *a*, 399, note (1), 1035 *a*; *Loomis v. Loomis*, 26 Vermont, 198; *Ward v. Morrison*, 25 Id. 593; *Post*, § 1057.

³ *Foster v. Fox*, 4 Watts & Serg. 92.

⁴ *Pattison v. Hull*, 9 Cowen, R. 747; *Cathcart's Appeal*, 1 Harris, 416.

⁵ *Burn v. Carvalho*, 4 Mylne & Craig, 690.

⁶ 4 Black. Comm. 135; 2 Co. Inst. 564; *Williams v. Protheroe*, 3 Younge & Jerv. 129; *Thalimer v. Brinckerhoff*, 20 Johns. R. 386; S. C. 3 Cowen, R. 623.

⁷ 4 Black. Comm. 135.

justice, and punishable accordingly, both at the common law and by statute, as tending to keep alive strife and contention, and to pervert the remedial process of the law into an engine of oppression.¹

¹ *Ibid.* Hawkins, in his *Pleas of the Crown*, Vol. 1, B. 1, ch. 86, § 1 (Leach's edit. 1795), says: "It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate. And it seemeth not to be material whether the title so sold be a good or a bad one, or whether the seller were in possession or not, unless possession were lawful and uncontested." This is laying down the doctrine very broadly, and more broadly than it is laid down in Blackstone's *Commentaries* (4 Black. Comm. 135). The statute of 32 Henry VIII. ch. 9, provides, "That no person or persons whatsoever shall bargain, buy, or sell, or by any ways or means, obtain, get, or have any pretended rights or titles to take, promise, grant, or covenant to have any right or title of any person or persons to any manors, lands, tenements, or hereditaments, but if (unless) such person or persons, their ancestors, or they by whom they claim the same, have been in possession of the same, or the reversion or remainder thereof, or taken the rents and profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made upon pain," &c. (2 Hawk. *Pleas of the Crown*, by Leach, B. 1, ch. 86, § 4). Mr. Russell (on *Crimes*, Vol. 1, B. 2, ch. 21, p. 266) says: "Maintenance seems to signify an unlawful taking in hand, or upholding of quarrels or sides to the disturbance or hindrance of common right. This may be, where a person assists another in his pretensions to lands by taking or holding the possession of them by force or subtilty, or where a person stirs up quarrels and suits in relation to matters wherein he is in no ways concerned; or it may be, where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defence of such suit. Where there is no contract to have a part of the thing in suit, the party so intermeddling is said to be guilty of maintenance. But if the party stipulates to have part of the thing in suit, his offence is called champerty." It would seem, that, where a party purchases the whole matter in controversy, and brings the suit not to support the title of another, but to support his own title, the case would not fall within the predicament either of maintenance or champerty, as thus defined by Mr. Russell or by Mr. Justice Blackstone, although it may be within the scope of the offence described by Hawkins, or of the statute of 32 Henry VIII. ch. 9, respecting the buying or selling of pretended or disputed titles. Be this as it may, it seems difficult to perceive how the language can be applied to matters of trust in lands, actual or constructive, where the trust, although disputed, falls within the jurisdiction of a court of equity. The case of a bill, brought for a specific performance of a disputed contract respecting the purchase of lands, by an assignee of the seller or buyer, turns upon the ground of trust; and yet it has been uniformly held to be within the jurisdiction of courts of equity. *Post*, § 1049 to 1051. So the case of the assignment of a disputed debt, or chose in action, or covenant, has been held

§ 1048 *a*. But the doctrine of the common law as to champerty and maintenance is to be understood with proper limitations and qualifications, and cannot be applied to a person having an interest or believing that he has an interest in the subject in dispute and *bonâ fide* acting in the suit; for he may lawfully assist in the defence or maintenance of that suit.¹

§ 1049. It was chiefly upon the ground of champerty and maintenance, that the courts of common law refused to recognize the assignment of debts, and other rights of action and securities; a good assignment in equity. See *Post*, § 1053, 1054, 1057. The true distinction will, perhaps, be found to be, that the doctrine of maintenance and champerty, and buying pretended titles, applies only to cases where there is an adverse right claimed under an independent title, not in privity with that of the assignor or seller, and not under a disputed right, claimed in privity, or under a trust for the assignor or seller. It is not strictly maintenance for a stranger to advance money for, or to agree to pay the costs of a suit not yet commenced; for the offence consists in such acts done after a suit is commenced. But courts of equity deem such acts as savoring of maintenance; and, therefore, will not enforce any contracts or rights growing out of them. *Wood v. Downes*, 18 Ves. 125. In *Harrington v. Long* (2 Mylne & K. 592), the Master of the Rolls defined maintenance somewhat differently from what it is in the text. He said: "Maintenance is, where there is an agreement, by which one party gives to a stranger the benefit of a suit, upon condition that he prosecutes it. See also *Prosser v. Edmonds*, 1 Younge & Coll. 496 to 499; *Ante*, § 1040 *c*; *Baker v. Whiting*, 3 Sumner, R. 475; *Post*, § 1050; *Hunter v. Daniel*, 9 Jurist, 521, 527; the comments of Mr. Vice-Chancellor Wigram, on *Harrington v. Long*, 2 Mylne & Keen, 592; and *Wood v. Downes*, 18 Ves. 120.

¹ In *Findon v. Parker*, 11 Mees. & Welsb. R. 675, 682, Lord Abinger said: "The law of maintenance, as I understand it, upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others to bring actions or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and, therefore, am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance; I am not prepared to say, that in modern times courts of justice ought to come to that conclusion. However, I give no opinion upon that point. In this case, I proceed upon the ground, that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question, at the time they made the agreement." See also *Pechell v. Watson*, 8 Mees. & Welsb. 691; *Hunter v. Daniel*, 4 Hare, R. 420; *Flight v. Leman*, 4 Adolph. & Ellis, New R. 883; *Co. Litt.* 368 *b*; *Hunter v. Daniel*, 9 Jurist, 526 (for 1845), where Mr. Vice-Chancellor Wigram comments on the authorities. *Call v. Calef*, 13 Metc. 362; *Ramsey v. Trent*, 10 B. Mon. 336.

although (as we have seen) the same doctrine does not prevail in equity. But still, courts of equity are ever solicitous to enforce all the principles of law respecting champerty and maintenance; and they will not, in any case,¹ uphold an assignment, which involves any such offensive ingredients.² Thus, for instance, courts of equity, equally with courts of law, will repudiate any agreement or assignment made between a creditor and a third person, to maintain a suit of the former, so that they may share the profits resulting from the success of the suit; for it will be a clear case of champerty.³ So, an assignment of a part of the subject of a pending prize suit, to a navy agent, in consideration of his undertaking to indemnify the assignor against the costs and charges of the suit, will be held void in equity; for it amounts to champerty, in being the unlawful maintenance of a suit, in consideration of a bargain for part of a thing, or some profit out of it.⁴ So, a bill to enforce a title acquired by a conveyance of real estate, from a person out of possession, in consideration of money advanced, and to be advanced, on suits for the recovery thereof, will be dismissed, even although the parties are first cousins; for it amounts to maintenance and is the buying of a pretended title.⁵ The only exceptions to the general rule are of certain peculiar relations recognized by the law; such as that of father and son; or of an heir.

¹ See *Hoyt v. Thompson*, 3 Sandf. R. 411; *Hopkins v. Hopkins*, 4 Strobh. Eq. R. 207.

² *Strachan v. Brander*, 1 Eden, R. 303, and note; *Id.* 309; *Skapholme v. Hart*, Rep. Temp. Finch, 477; *Burke v. Green*, 2 B. & Beatt. 517; *Wood v. Downes*, 18 Ves. 125, 126; *Wood v. Griffith*, 1 Swanst. R. 55, 56; *Wallis v. Duke of Portland*, 3 Ves. R. 493, 502; *Stone v. Yea*, Jac. Rep. 426; *Ante*, § 294, 297; *Arden v. Patterson*, 5 Johns. Ch. R. 44, 48, 51.

³ *Hartley v. Russell*, 2 Sim. & Stu. R. 244; *Satterlee v. Frazer*, 2 Sandf. R. 141; *Merrit v. Lambert*, 10 Paige, 352; 2 Denio, 607; *Lathrop v. Amherst Bank*, 9 Met. 489; *Elliott v. McClelland*, 17 Ala. 206; *Thompson v. Warren*, 8 B. Monroe, 488. See *Riggs v. Shurley*, 9 Humph. 71. In *Hunter v. Daniel*, 9 Jurist, p. 526, 581, Sir James Wigram, V. C., said: "I am by no means certain that the opinion of Sir John Leach in that case (*Harrington v. Long*, 2 M. & K. 590), is perfectly consistent with what he decided in *Hartley v. Russell*, 2 Sim. & Stu. 244."

⁴ *Stevens v. Bagwell*, 15 Ves. 156.

⁵ *Burke v. Green*, 2 B. & Beatt. 521, 522; *Marquis of Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 135, 136; *Powell v. Knowler*, 2 Atk. 224; *Bayly v. Tyrrell*, 2 B. & Beatt. 358; *Thalhimer v. Brinckerhoff*, 3 Cowen, R. 623.

apparent; of the husband of an heiress;¹ or of master and servant;² and the like.

§ 1050. But consistently with these principles, a party may purchase, by assignment, the whole interest of another in a contract, or security, or other property which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the exclusive interest, which he has so acquired.³ Thus, for example, it is extremely clear, that an equitable interest, under a contract of purchase of real estate, may be the subject of sale. A person, claiming under such an original contract, in case he afterwards sells his purchase to sub-purchasers, becomes, in equity, a trustee for the persons, to whom he so contracts to sell. Without entering into any covenant for that purpose, such sub-purchasers are obliged to indemnify him from the consequence of all acts, which he must execute for their benefit. And a court of equity not only allows, but actually compels him to permit them to use his name in all proceedings for obtaining the benefit of their contract.⁴ Such indemnity and such proceedings, under such circumstances, are not deemed maintenance.⁵ So, if there be a trust estate in lands, either actual or constructive, which, however, is controverted by the trustee, the *cestui*

¹ Ibid.; *Moore v. Usher*, 7 Sim. R. 384.

² 4 Black. Com. 135.

³ See *Williams v. Protheroe*, 5 Bing. R. 309; S. C. 3 Younge & Jerv. 129; *Harrington v. Long*, 2 Mylne & Keen, 592; *Thalhimer v. Brinckerhoff*, 3 Cowen R. 623. But see *Prosser v. Edmonds*, 1 Younge & Coll. 485, 496 to 499; *Hartley v. Russell*, 2 Sim. & Stu. 244; *Hunter v. Daniel*, 9 Jurist, p. 526, 531 (for 1845).

⁴ *Deaver v. Eller*, 7 Jones, Eq. R. 24. [* So if one buy an inland bill of exchange in the regular course of business, although not indorsed, a court of equity will enjoin the payee from dismissing a suit, brought in his name by the holder, even where the alleged maker and payee both repudiate it as a forgery, the holder indemnifying the payee. *Dibble v. Scott*, 5 Jones, Eq. R. 164.]

⁵ *Wood v. Griffith*, 1 Swanst. R. 55, 56; S. C. Sugden on Vendors, ch. 9, § 6, p. 488 (7th edit.). The case of *Arden v. Patterson* (5 Johns. Ch. R. 44) may seem to support a different doctrine. That case was decided upon principles perfectly clear, with reference to the relation of the parties (Attorney and Client) and the other circumstances. If it should be thought to lay down the more general doctrine, that a purchase cannot be made absolutely of a chose in action, or other matter in controversy, it would hardly be reconcilable with the other cases referred to in the text. See also *Thalhimer v. Brinckerhoff*, 3 Cowen, R. 623; *Harrington v. Long*, 2 Mylne & Keen, 590, 592, 593.

que trust (or beneficiary) may; nevertheless, lawfully assign it; and the assignee may, in equity, enforce his rights to the same, if the assignment does not, in the sense above stated, savor of maintenance.¹

¹ *Baker v. Whiting*, 3 Sumner, R. 475, 481 to 484. On this occasion the court said: "The main objection, however, taken to the operation of this deed, is, that, at the time of this conveyance by Stimpson to Baker, the defendant was in full possession and seisin of the premises, claiming them in his own right, and of course, that Stimpson was then disseised, and the conveyance to Baker was void under the operation of the common law relative to maintenance and champerty, and the statute of 32 Henry VIII. ch. 9, made in aid thereof. This statute prohibits, under penalties, the buying or selling of any pretended right or title to land, unless the vendor is in actual possession of the land, or of the reversion or remainder. The object of the statute, as well as of the common law, was doubtless to prevent the buying up of controverted legal titles, which the owner did not think it worth his while to pursue upon mere speculation; so that in fact it might properly be deemed the mere purchase of a lawsuit. (4 Black Com. 135, 136; Hawk. Pl. of the Crown, B. 1, ch. 83, § 1 to 20; Id. B. 1, ch. 84, § 1 to 20; Id. B. 1, ch. 86, § 1, 4 to 17). The old cases upon this subject have gone a great way further, indeed, than would now be sustained in the courts of equity, which have broken in upon some of the doctrines established thereby. But, be this as it may, neither the common law, nor the statute, applies to a trust estate actually existing, either by the acts of the parties, or by construction of law. Thus a *cestui que trust* may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee; for the latter can never disseise the former of the trust estate; but so long as it continues, the possession of the trustee is treated, at least in a court of equity, as the possession of the *cestui que trust*. There can be no disseisin of a trust; although the exercise of an adverse possession for a great length of time may, in equity, bar or extinguish the trust. The whole question in the present case turns upon this: whether the defendant, Whiting, at the time of his purchase of the premises at the sale for taxes, in August, 1821, was the agent of the heirs of Jacob Tidd of Stimpson, and of other proprietors, of their undivided shares in the premises. If he was, then, upon the acknowledged principles of courts of equity, he, as an agent, could not become a purchaser at the sale for himself; but his purchase must be deemed a purchase for his principals. It matters not, whether, in such a case, the defendant intended to purchase for himself, and on his own account, or not. For courts of equity will not tolerate any agent in acts of this sort, since they operate as a virtual fraud upon the rights and interests of his principals, which he is bound to protect. He was bound, as their agent for the premises, to give them notice of the intended sale, and to save the property from any sacrifice; and, until he had openly and notoriously, and after full notice to the principals, discharged himself from his agency, he could not be permitted, in a court of equity, to become a purchaser at the sale. If, indeed, as there is much reason to believe, at the time of the sale, he had funds of his principals in his own hands, sufficient to meet the taxes; and *à fortiori*, if he endeavored to dissuade or to prevent other persons from becoming bidders at the sale, as some of

§ 1051. This doctrine has been fully recognized by an eminent judge, who, on one occasion, where a sub-contract of this sort occurred in judgment, used the following language: "If G. and W. (the original vendees), during the pendency of the suit in the Exchequer, sold the estate to A. B., he would have a right in a court of equity to insist, as purchaser of the estate, that they should convey to him the fee-simple, or such title as they had. So insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interest. Having sold, they become trustees of that equitable interest; their vendee acquires the same right which they had, that is, a right to call on the original vendors, indemnifying them against all costs and charges for the use of their names, to enable them to execute the sub-contract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this court, which has always given to parties, entering into a sub-contract,

the evidence states, his conduct was, supposing him to be agent, still more reprehensible. The validity of the conveyance then, from Stimpson to Baker, depends upon the fact, whether the defendant, Whiting, was or was not the agent and mere trustee of the parties; and whether, if agent, *eo constanti*, that the conveyance under the tax sale was made to him, the law did not attach the trust to the lands in his hands. If it did, then the conveyance of Stimpson to Baker was valid. If it did not, then it was void, as falling within the reach of the doctrines respecting maintenance, champerty, and pretended titles. Those doctrines do not apply to trusts created in privity of estate, but to adverse and independent titles between strangers. It is quite a mistake to suppose, that a controverted trust may not be assigned by the owner, when it is clearly and unequivocally attached to property. If a contract is made for the sale of lands, the contractee may sell and assign the whole, or a part, or make a binding sub-contract respecting the same, whether there be a controversy respecting the specific performance of the original contract or not. The case of *Wood v. Griffith* (1 Swanst. R. 55, 56) is fully in point upon the doctrine, even when the assignment or sale is made during the pendency of a suit for a specific performance. See, also, 2 Story on Eq. Jurisp. § 1048 to 1051, 1053, 1054; *Harrington v. Long*, 2 Mylne & Keen, R. 590; *Hartley v. Russell*, 2 Sim. & Stu. R. 244. In the case of *Prosser v. Edmonds*,¹ 1 Younge & Coll. R. 497, 498, there was no trust, but a mere naked right to set aside a conveyance for fraud, which distinguishes it from the present case. I repeat it, therefore, that the whole question, whether the deed from Stimpson to Baker was a valid conveyance or not, depends upon the point, whether, at the time, the defendant was actually or constructively a trustee of the premises for Stimpson."

the benefit which the vendors derived from the primary contract.”¹

§ 1052. Upon the like grounds, where a creditor, who had instituted proceedings at law and in equity against his debtor, entered into an agreement with the debtor to abandon those proceedings, and give up his securities, in consideration of the debtor's giving him a lien on other securities in the hands of another creditor, with authority to sue the latter, and agreeing to use his best endeavors to assist in adjusting his accounts with the holder, and in recovering those securities; it was held, that the agreement was lawful, and not maintenance; for there was no bargain, that the assignee should maintain the suit, instituted in the assignor's name, against such creditor, having the other securities, in consideration of sharing in the profits to be derived from that suit. The agreement was, in effect, nothing more than an assignment of the equity of redemption of the assignor in the securities held by such creditor in exchange for the prior securities held by the assignee. The authority, given to the assignee to sue such creditor, was the common legal provision in the case of an assignment of a debt or security.²

§ 1053. So, where, by articles of agreement for the sale of an estate, it was agreed between the vendor and purchaser, that the purchaser, bearing all the expenses of certain suits, commenced by the vendor against an occupier for bygone rents, should have the rents so to be recovered, and also any money recovered for dilapidations, and that the purchaser, at his own expense, and indemnifying the vendor, might use the name of the vendor, in any action he might think fit to commence therefor; it was held, that the agreement was not void for maintenance or champerty.³

§ 1054. Indeed, there is no principle in equity, which prevents a creditor from assigning his interest in a debt after the institution of a suit therefor, as being within the statutes against champerty and maintenance. Such an assignment gives the person, to whom it is made, a right to institute a new proceeding, in order to obtain the benefit of the assignment. And the proper mode of doing this is by the assignee's filing a supplemental bill, (if the suit is still pending,) making the assignor and the debtor defendants.

¹ Per Lord Eldon, in *Wood v. Griffith*, 1 Swanst. 56.

² *Hartley v. Russell*, 2 Sim. & Stu. R. 244.

³ *Williams v. Protheroe*, 5 Bing. R. 309; S. C. 3 Younge & Jerv. 129.

But, if the assignment contains an agreement, that the assignee is to indemnify the assignor, not only against all costs incurred, and to be incurred, with reference to the subject-matter assigned, but also against all costs to be incurred in that suit for collateral objects and claims, totally distinct from the subject-matter assigned, it will be held void for maintenance.¹

§ 1055. So strongly are courts of equity inclined to uphold assignments, when *bonâ fide* made, that even the assignment of freight, to be earned in future, is good in equity, and will be enforced against the party from whom it becomes due.² So an assignment of a whale-ship by way of mortgage, and of all oil, head-matter, and other cargo caught or brought home on a whaling voyage, will amount to a good assignment of the future cargo of oil and head-matter obtained in the voyage.³ And, whenever an assignment is made of a debt, or other personal property, although it is charged on land, as, for example, a pecuniary legacy charged on land, the assignment will be treated as an assignment of money only, and, therefore, it will not be affected by the policy of the registration laws, by which conveyances of the interests in land are required to be registered.⁴

§ 1056. In courts of law, these principles of courts of equity are now acted on to a limited extent.⁵ But still, whenever a bond or other debt is assigned, and it is necessary to sue at law for the recovery thereof, it must be done in the name of the original creditor, the person to whom it is transferred being treated rather as an attorney than as an assignee, although his rights will be recog-

¹ *Harrington v. Long*, 2 Mylne & Keen, 590, 592, 593, 598, 599. The report in this case is somewhat obscure, and does not exactly present the true ground of the decision. But the argument of the counsel for the defendant, in pages 558, 599, shows it.

² *Leslie v. Guthrie*, 1 Bing. New Cas. 697; *Douglas v. Russell*, 4 Sim. R. 524; S. C. 1 Mylne & Keen, 488; *Watson v. Duke of Wellington*, 1 Russ. & Mylne, 602, 605; *Ante*, § 1040. *In re Ship Warre*, 8 Price, R. 269, note; *Curtis v. Auber*, 1 Jac. & Walk. 526; *Robinson v. McDonnell*, 5 M. & Selw. 228; *Ante*, § 1040 *b*; *Langton v. Horton*, 1 Hare's R. 549, 556, 557.

³ *Langton v. Horton*, 1 Hare's R. 549, 556, 557; S. C. 5 Beavan's R. 9; *Mitchell v. Winslow*, 2 Story's R. 630.

⁴ *Malcolm v. Charlesworth*, 1 Keen, R. 63.

⁵ See *Hartley v. Tapley*, 2 Gray, 565; *Emery v. Lawrence*, 8 Cush. R. 151; *Mulhall v. Quinn*, 1 Gray, 105; *Bourne v. Cabot*, 3 Met. 305; *Brackets v. Blake*, 7 Id. 335.

nized, and protected, in some measure, at law, against the frauds of the assignor.¹

§.1057. In equity, on the other hand, the assignee may sue on such an assignment in his own name, and enforce payment of the debt directly against the debtor, making him, as well as the assignor (if necessary), a party to the bill. The assignment of a debt does not, in equity, require even the assent of the debtor, in any manner, thereto;² although, to make it effectual for all purposes, it may be important to give notice of the assignment to him; since, until notice, he is not affected with the trust created thereby, and the rights of third persons may intervene to the prejudice of the assignee.³ The ground of this doctrine is, that the creditor has, in equity, a right to dispose of his own property as he may choose; and to require the debt to be paid to such person as he may direct, without any consultation with the debtor, who holds the debt, subject to the rights of the creditor.

§ 1057 *a.* It has, however, been recently held, that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor for it in equity, unless some circumstances intervene, which show that his remedy at law is, or may be, obstructed by the assignor; for, otherwise, the assignee, although he may not sue therefor in his own name in a court of law, yet may sue in the name of the assignor.⁴ But, if the assignor refuses to allow the assignee to sue for the debt in his name at law, or has done, or intends to do some act, which may or will prevent the assignee from recovering in a suit at law in the name of the assignor, that, if alleged in the bill, will be sufficient to sustain a suit in equity in the

¹ *Malcolm v. Charlesworth*, 1 Keen, R. 63; *Ryall v. Rowles*, 1 Ves. 353, 362; *Welch v. Mandeville*, 1 Wheat. R. 535; *Madenville v. Welch*, 5 Wheat. R. 277, 283; *Tiernan v. Jackson*, 5 Peters, R. 597 to 602. But see *Gibson v. Winter*, 2 Neville & Perry, R. 277 to 283.

² *Ex parte South*, 3 Swanst. R. 393; *Spring v. South Carolina Ins. Co.* 8 Wheat. R. 268, 282; *Ante*, § 783, 1044, 1045.

³ See *Williams v. Thorp*, 2 Simons, R. 257; *Tourville v. Naish*, 3 P. Will. 307, 308; *Langley v. Earl of Oxford*, Ambler, R. 17; *Ashcomb's case*, 1 Ch. Cas. 232; *Dearle v. Hall*, 3 Russ. R. 1; *Loveridge v. Cooper*, Id. 30; *Wallwyn v. Coutts*, 3 Meriv. R. 707; S. C. 3 Sim. 14; *Collyer v. Fallon*, 1 Turn. & Russ. 469; *Foster v. Blackstone*, 1 Mylne & Keen, 297; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Ante*, § 399, note (1), § 421 *a.*, 783, 1035 *a.*, 1047; *Elty v. Bridges*, 3 Younge & Coll. New R. 486, 492.

⁴ But see *Dhegetoft v. London Assur. Co.*, Moseley, R. 83; and *Carter v. United Insur. Co. of New York*, 1 Johns. Ch. R. 463, 464; *Post*, § 1057 *b.*

name of the assignee against the debtor.¹ This doctrine is apparently new, at least in the broad extent in which it is laid down; and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt, or other property, (as the assignee of a debt certainly has,) there a court of equity is the proper forum to enforce it; and he is not to be driven to any circuitry by instituting a suit at law in the name of the person who is possessed of the legal title.² A *cestui que trust* may, ordinarily, sue third persons in a court of equity, upon his equitable title, without any reference to the existence of a legal title in his trustee, which may be enforced at law.

§ 1057 *b*. Cases indeed may exist, where, although the equitable title only has passed by the assignment, yet the remedy under ordinary circumstances may justly be held to remain at law. But these cases may constitute exceptions to the general rule, rather than expositions of it; for they turn upon the consideration that under the circumstances a court of equity does not possess as ample and appropriate means to grant the proper relief as a court of law; or, what in effect amounts to the same thing, that a court of equity cannot administer entire justice without resorting to the same means, a trial by jury, as a court of law. Thus, for

¹ Ibid. *Hammond v. Messenger*, 9 Simons, R. 327. On this occasion the Vice-Chancellor (Sir R. Shadwell) said: "If this case were stripped of all special circumstances, it would be, simply, a bill filed by a plaintiff, who had obtained from certain persons, to whom a debt was due, a right to sue in their names for the debt. It is quite new to me, that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor, by the person who has become the assignee of the debt. I admit, that if special circumstances are stated, and it is represented that notwithstanding the right, which the party has obtained, to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case, where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances." See also *S. P. Rose v. Clarke*, 1 Y. & Coll. New R. 446, 534.

² *Riddle v. Mandeville*, 5 Cranch, 322; *Post*, § 1250; *Townsend v. Carpenter*, 11 Ohio (Stanton's) Rep. 21.

example, if the assignment be of a contract involving the consideration and ascertainment of unliquidated damages, as in case of the assignment of a policy of insurance, there, unless some obstruction exists to the remedy at law, it would seem that a court of equity ought not or might not interfere to grant relief; for the facts and the damages are properly matters for a jury to ascertain and decide.¹ But the same objection would not lie to an assignment of a bond or other security for a fixed sum.²

[* § 1057 c. It will have been perceived that the subject of the assignment of rights of action, as tending to the common law offences of champerty and maintenance, is here left in a state of considerable uncertainty. The subject was examined in a late case,³ and the following conclusion reached: That the *bonâ fide* purchaser of a bond, or note not negotiable, or other chose in action, which is of the nature of a debt, which is represented to be due, and which the purchaser believes to be due, may sue upon the same, and not incur censure from the law; and that all contracts founded upon any such consideration are perfectly valid. The same is true of any aid one may render another in a suit, by way of money, or advice, or other lawful assistance, if done under a *bonâ fide* belief in the justice of the cause. And in this case it was held that a claim for personal property, taken by way of tort, might be lawfully assigned, while a suit was pending, and the assignee take the risk and expense of the suit, as from the beginning. And it has been held that one may lawfully sell land in the adverse possession of another, and that the vendee thereby acquires

¹ *Dhegetoft v. London Assur. Co.* Moseley, R. 83; *Carter v. United Ins. Co.* 1 Johns. Ch. R. 463. These cases were on policies of insurance; and Mr. Chancellor Kent, in the latter case, said: "The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs and Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the Chancellor, in the analogous case of *Dhegetoft v. The London Assurance Company*, Moseley, 83, that, at this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in Parliament. 3 Bro. P. C. 525. The bill, in this case, states no special ground for equitable relief; nor is any discovery sought which requires an answer."

² *Post*, § 1250.

³ [* *Danforth v. Streeter*, 28 Vt. R. 490.

the right to sue for the same, in the name of the grantor, for his own benefit; and that even a court of law will take notice of and protect his equitable interest.¹ It was upon these grounds that we ventured to suggest² that the common-law notion of maintenance, as applicable to the assignment of rights of action, had become practically obsolete.]

CHAPTER XXIX.

WILLS AND TESTAMENTS.

[* § 1058. Courts of equity enforce all trusts under wills.

§ 1059. In courts of equity, trusts never fail for want of a trustee.

§ 1060. Equity will find a trustee, or make one.

§ 1061. Will execute a power connected with trust.

§ 1061 *a.* Power to sell will not justify a mortgage.

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§ 1062. How far joint power may be executed by survivor.

§ 1062 *a.* The execution must profess to follow power.

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§ 1064 – 1064 *c.* Powers so construed as to effect their object.

§ 1065. The interference of courts of equity often required in the settlement of estates, to determine duty of executor, &c.

§ 1065 *a.* Distinction between perpetual and life annuities.

§ 1065 *b.* Construction of terms “relations,” “next of kin,” &c.

§ 1065 *c.* The terms “cousin,” “nephew,” “niece,” &c.

§ 1065 *d.* Conflicting claims to bequests better settled in equity.

§ 1065 *e.* Lapsed legacies go to residuary legatee.

§ 1066. Construction of executed and executory trusts, in equity and at law.

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§ 1067 *a.* Words creating estate tail construed differently with reference to real and personal estate.

§ 1067 *b.* Subject further discussed and illustrated.

§ 1068 – 1068 *b.* How far mere wish, or desire, creates a trust.

§ 1069. The courts now incline to give the words their natural force.

§ 1070. If objects, or subject-matter, indefinite, no trust arises.

§ 1071. Certainty may exist without use of names.

§ 1072. Illustrations of certainty and uncertainty.

§ 1073. Uncertainty of persons and subject-matter illustrated.

§ 1074. Illustrations of the subject from the civil law.

§ 1074 *a.* *Cy pres*: General intent prevails if special intent illegal.

§ 1074 *b* – 1074 *g.* Cases illustrating the construction of wills.]

¹ *Edwards v. Parkhurst*, 21 Vt. R. 472.

² *Ante*, § 44, n. 1.]

§ 1058. EXPRESS trusts in regard to real and personal property, created by LAST WILLS AND TESTAMENTS, are so various in their nature and objects, and so extensive in their reach, that it would be impracticable to comprehend them within the plan of these commentaries. They are most usually created for the security of the rights and interest of infants, of *femes covert*, of children, and of other relations; or for the payment of debts, legacies, and portions; or for the sale or purchase of real estate for the benefit of heirs, or others having claims upon the testator; or for objects of general or special charity. Many trusts, also, arise under wills, by construction and implication of law. But in whatever way, or for whatever purpose, or in whatever form, trusts arise under wills, they are exclusively within the jurisdiction of courts of equity. Indeed, so many arrangements, modifications, restraints, and intermediate directions are indispensable to the due administration of these trusts, that, without the interposition of courts of equity, there would, in many cases, be a total failure of justice.¹

§ 1059. This will be obvious from the consideration that trusts are often created by will, without the designation of any trustee, who is to execute them; or it may be matter of doubt, upon the terms of the will, who is the proper party. It is a settled principle in courts of equity, that a trust shall never fail for the want of a proper trustee.²

§ 1060. Thus, for example, if a testator should order his real estate, or any part thereof, to be sold for the payment of his debts, without saying who should sell, in such a case a clear trust would be created. A court of law will not, in such a case, take cognizance of the trust. Nor will it undertake to construe a will, so far as it regards mere trusts; and if a case be sent for the opinion of the judges, stating it as a trust, they will decline giving any opinion thereon.³ But a court of equity will not hesitate, in such a case, to declare who is the proper party to execute the trust; or, if no one is designated, it will proceed to execute the trust by its own authority, and decree a sale of the land. In the

¹ As to what words in a will will constitute a charge on real estate, for the payment of debts, see *post*, § 1246.

² *Ante*, § 976; Co. Litt. 290 b, Butler's note (1), § 4; *Peter v. Beverly*, 10 Peters, R. 532; 1 Howard, Sup. Ct. R. 134.

³ 1 Madd. Ch. Pr. 436.

case put, of a trust for the payment of debts, if executors are named in the will, they will be deemed, by implication, to be the proper parties to sell; because in equity, when lands are directed to be sold, they are treated as money; and, as the executors are liable to pay the debts, and, if the lands were money, as they would be the proper parties to receive it for that purpose, courts of equity will hold it to be the intent of the testator, that the parties who are to receive and finally to execute the trust are the proper parties to sell for the purpose.¹

§ 1061. In the next place, let us suppose the case of a will giving power to trustees to sell an estate upon some specified trust, and they should all refuse to execute the trust, or should all die before executing it. Now, it is a well-known rule of law, that powers are never imperative; but the acts to be done under them are left to the free will of the parties to whom they are given. The same rule is applied at law to such powers, even when coupled with a trust. Hence, in the case supposed, the trust would at law be wholly gone. The trustees, if living, could not at law be compelled to execute the trust; and by their death the power would be entirely extinguished.² But a court of equity would treat the whole matter in a very different way. It would compel the trustees, if living, to execute the power, because coupled with a trust, although it would not compel them to execute a mere naked power, not coupled with a trust.³ If the trustees

¹ See *Peter v. Beverly*, 10 Peters, R. 532, and cases there cited; *Bank of United States v. Beverly*, 1 How. Sup. Ct. R. 134; *S. C.* 17 Peters, R. 127; *Wood v. White*, 4 M. & Craig, 460, 481. In this last case, Lord Cottenham said: "The circumstances of this case are so peculiar that there is no probability of any decision having taken place directly in point; but there are rules established strongly analogous, by which a power or trust to sell has been held to be created by implication. If a testator directs that his lands shall be sold, and the proceeds to be distributed by his executors, they have the power to sell, though no such power is in terms given to them. So, if a testator merely charges his lands with the payment of his debts, this is so equivalent to a trust for that purpose, that a purchaser is not bound to see to the application of the purchase-money. In both cases the power and trust are implied for the purpose of carrying into effect the declared intention as to the purchase-money"; p. 481. *Lockton v. Lockton*, 1 Ch. Cas. 180; *Carville v. Carville*, 2 Ch. Rep. 301; *Blatch v. Wilder*, 1 Atk. 420; *Jackson v. Ferris*, 15 Johns. R. 346; *Forbes v. Peacock*, 11 Sim. R. 152, 160.

² Sugden on Powers, ch. 6, § 3, p. 392, &c. (7th edit.); Co. Litt. 113 a, Hargrave's note (2); *Franklin v. Osgood*, 14 Johns. R. 527.

³ *Ante*, § 169, 170; Sugden on Powers, ch. 6, § 3, p. 362, &c. (3d edit.); 1 Fonbl. Eq. B. 1, ch. 4, § 25, n. (h); *Tollett v. Tollett*, 2 P. W. 490.

should decline, or refuse to act at all, the court would appoint other trustees, if necessary, to carry the trust into effect.¹ And if the trustees should die, without executing the power, it would hold the trust to survive, and, upon a suitable bill in equity by the parties in interest, would decree its due execution by a sale of the estate for the specified trust.² It is upon the same ground, that, if a power of appointment is given by will to a party to distribute property among certain classes of persons, as among relations of the testator, the power is treated as a trust; and if the party dies without executing it, a court of equity will distribute the property among the next of kin.³

[* § 1061 *a.* But where a testator directed his trustees to sell his real estate, and instead of selling they mortgaged and retained the estate, it was held that they thereby committed a breach of trust; and the estate having become depreciated, they were held liable for the loss. It was also held, that, as against a mortgagee with notice, the mortgage was void, but that he was entitled to stand as a creditor on the produce of the estate.⁴]

§ 1061 *b.* When, and under what circumstances, a power of appointment will be construed as a trust or not, is a matter of some nicety and difficulty. In general, it may be stated, that where, in case of a will or other instrument, the donor of the power has a general intention in favor of a class, and a particular intention in favor of individuals of that class, to be selected by the donee of the power, and the particular intention fails from that selection not being made by the donee of the power, the court will treat it as a trust, and carry into effect the general intention in favor of the class.⁵ Thus, for example, where the testator bequeathed a certain leasehold estate to A. upon trust, subject to certain charges,

¹ *De Peyster v. Clendining*, 8 Paige, R. 296.

² *Ibid.*; *Brown v. Higgs*, 8 Ves. 570, 574; *Richardson v. Chapman*, 5 Bro. Parl. Cas. 400. We have already seen, that courts of equity will not execute indefinite trusts. *Ante*, § 979 *a*; *Post*, § 1183.

³ The cases on this point are numerous. See Mr. Jarman's note to 1 Powell on Devises, 294; *Davy v. Hooper*, 2 Vern. 665; *Harding v. Glynn*, 1 Atk. 469; *Maddison v. Andrew*, 1 Ves. 57; *Witts v. Boddington*, 3 Bro. Ch. 95; *Cole v. Wade*, 16 Ves. 27; *Birch v. Wade*, 3 V. & Beam. 198; *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561, 569, 570; Sugden on Powers, ch. 6, § 3, p. 393 to 398 (3d edit.); *Stubbs v. Sargon*, 2 Keen, R. 255.

⁴ *Devaynes v. Robinson*, 24 Beavan, 86.

⁵ *Burrough v. Philcox*, 5 Mylne & Craig, 73, 92.

to employ the remainder of the rent to such children of B. as A. should think most deserving, and that will make the best use of it, or to the children of his nephew C., if any such there are or shall be; and A. died in the testator's lifetime, the bequest to the children was held to be a trust in favor of all the children of B. and C.¹ So, where the testator directed certain stocks and real estate to remain unalienated until certain contingencies were completed; and then, after giving life-estates to his two children in such stocks and real estates, with remainder to their issue, declared, that in case his two children should die without leaving lawful issue, the same should be disposed of by the survivor of his children by will among his nephews and nieces, or their children, or either of them, or to as many of them as his surviving child should think proper; it was held to be a trust created in favor of the testator's nephews and nieces, and their children, subject to a power of selection and distribution by the surviving child.² So, where the testator devised to B. in tail, and for want of issue of her body, he empowered and authorized her to settle and dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family," it was held to be a power coupled with an interest in favor of the heir, who was held to be the nearest family in the sense of the will.³

§ 1062. In regard to powers, too, some subtle distinctions have been taken at law, which often require the interposition of courts of equity. Thus, for instance, it is a general rule of law that a mere naked power, given to two, cannot be executed by one; or, given to three, cannot be executed by two, although the other be dead;⁴ for, in each case, it is held to be a personal trust in all the persons, unless some other language is used to the contrary. Then, suppose a testator, by his will, should give authority to A. and B. to sell his estate, and should make them his executors, in such a case, it has been said, that the survivor could not sell. But, if the testator should give authority to his executors (*eo nomine*) to sell, and should make A. and B. his executors, there, if one should die,

¹ *Brown v. Higgs*, 8 Ves. 574; S. C. 4 Ves. 708, and 5 Ves. 495; 2 Sugden on Powers, 176.

² *Burrough v. Philcox*, 5 Mylne & Craig, 73, 92. See *Prendergast v. Prendergast*, 3 Eng. Law & Eq. R. 16; *Ante*, § 1061.

³ *Griffiths v. Evan*, 5 Beavan, R. 241.

⁴ Co. Litt. 112 b, 113 a, and Hargrave's note (2).

the survivor (it has been said) could sell.¹ The distinction is nice, but it proceeds upon the ground, that in the latter case, the power is given to the executors *virtute officii*, and, in the former case, it is merely personal to the parties named. Now, although this distinction has been doubted, and its soundness has been denied, yet it has much authority also in its support, where the power is deemed at law to be a mere naked power.² Where the power is coupled with an interest, the construction might be different, even at law. But, at all events, if the power is coupled with a trust, courts of equity will insist upon its execution, upon the principles already stated.³ Still, however, the construction upon the very words of the particular will might be very important, even in equity; since, if the power should survive, it would not be necessary to make the heir join in the sale of the property. If it should not survive, he would not be compelled to join in the sale.⁴

§ 1062 a. It is a general rule, that, in the execution of a power, the donee of the power must clearly show that he means to execute it, either by a reference to the power or to the subject-matter of it; for, if he leaves it uncertain whether the act is done in execution of the power or not, it will not be construed to be an execution of the power.⁵

¹ Ibid.

² See *Franklin v. Osgood*, 14 Johns. R. 527, 553; *Zebach v. Smith*, 3 Binn. R. 69; 1 Powell on Devises, by Jarman, 239, and note (1); Co. Litt. 113 a, Hargrave's note (2).

³ Co. Litt. 113 a, Hargrave's note (2); *Jackson v. Burtis*, 14 Johns. R. 391; Sugden on Powers, ch. 2, § 1, p. 105 to 111 (3d edit.). Mr. Hargrave, in his note to Co. Litt. 113 a, has discussed this subject with great acuteness and learning. Mr. Sugden has summed up the result of the decisions in the following propositions. (1.) That, where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words. (2.) That, where it is given to three or more generally, as "to my trustees," "my sons," &c., and not by their proper names, the authority will survive whilst the plural number remains. (3.) That, where the authority is given to executors, and the will does not expressly point to the joint exercise of it, even a single surviving executor may execute it. But, (4.) That, where it is given to them *nominatim*, although in the character of executors, it is at least doubtful whether it will survive. Sugden on Powers, ch. 3, § 2, art. 1, p. 165, 166 (3d edit.).

⁴ Ibid.; Co. Litt. 290 b, Butler's note, § 7; *Jackson v. Ferris*, 15 Johns. R. 347; *Franklin v. Osgood*, 14 Johns. R. 527, 553.

⁵ Sugden on Powers, vol. 1, ch. 6, § 2, p. 257; Ibid. § 7, p. 373; Ibid. § 8, p. 470; *Owens v. Dickenson*, 1 Craig & Phill. 53; *Blagge v. Miles*, 1 Story's R. 426, 445 to 450. In this last case, the court, after referring to the doctrine that the inten-

[* § 1063. In the construction of wills, difficult questions arise as to the extent and manner of executing powers; but we can

tion governs in wills, said: "Similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The main point is, to arrive at the intention and object of the donee of the power in the instrument of execution; and, that being once ascertained, effect is given to it accordingly. (*Bennett v. Aburrow*, 8 Ves. 609.) The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that, if the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree, that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds, demonstrating the intention. This was directly asserted, not only in *Sir Edward Clere's* case (6 Co. R. 17), but it was positively affirmed in *Scrope's* case (10 Co. R. 143, 144), where the reason of the rule is stated: *Quia non refert, an quis intentionem suam declaret verbis, an rebus ipsis vel factis*. On the other hand, to use the language of Lord Chief Justice Best, in *Doe d. Nowell v. Roake* (2 Bing. R. 497, 504), 'No terms, however comprehensive, although sufficient to pass every species of property, freehold or copyhold, real or personal, will execute a power, unless they demonstrate that a testator had the power in his contemplation, and intended by his will to execute it.' Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1.) Where there has been some reference in the will or other instrument to the power; (2.) Or a reference to the property, which is the subject on which it is to be executed; (3.) Or, where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation except as an execution of the power. (*Langham v. Nenny*, 3 Ves. 467; *Bennett v. Aburrow*, 8 Ves. 609, 616.) It seems unnecessary to refer at large to the cases which establish these propositions. They will be found collected generally, in Mr. Chance's *Treatise on Powers* (vol. 2, ch. 13, § 1591 to 1714), and in Sir Edward Sugden's *Treatise on Powers* (vol. 1, ch. 6, § 2, p. 257, &c.; *Id.* § 7, p. 373, &c.; *Id.* § 8, p. 430, &c.); and in the opinion of the court, delivered by Lord Chief Justice Best, in *Doe d. Nowell v. Roake* (8 Bing. 497). Lord Chief Baron Alexander, in delivering the judgment of the judges in the House of Lords, in *Doe d. Nowell v. Roake* (6 Bing. R. 475), reversing the decision in the same case, in 2 Bing. R. 497, and affirming that of the King's Bench (5 B. & Cressw. 720), has enumerated the same classes of cases; and he has added, that in no instance has a power or authority been considered as executed, unless under such circumstances. Whether this be so or not, it is not material to inquire; for there is no pretence to say, that, because no other cases have as yet occurred, there can be no others. That would, in fact, be

only allude to some of the perplexing doubts which have thus to say, that the cases governed the general rule as to intention, and not the rule the cases. Lord Chief Justice Best has put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof required to establish the intention to execute the power; but they are not the only cases (*Doe d. Nowell v. Roake*, 2 Bing. R. 504). On the contrary, if a case of clear intention should arise, although not falling within the predicament of these classes it must be held, that the power is well executed, unless courts of justice are at liberty to overturn principles, instead of interpreting acts and intentions. I entirely agree with Lord Chief Justice Best, in his remark in *Roake v. Denn* (4 Bligh, N. S. 22), that ‘rules with respect to evidence of intention are bad rules, and I trust I shall live to see them no longer binding on the judges.’ The Lord Chancellor (Lord Lyndhurst) said, that ‘It has been settled by a long series of decisions, from the case which has been referred to in the time of Sir Edward Coke, Sir Edward Clere’s case (6 Co. R. 17), down to the present time, that, if the will, which is insisted on as an execution of the power, does not refer to the power, and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there be some other circumstances to show that it was the intention of the devisor to execute the appointment by the will, under such circumstances, the court have uniformly held, that the will is not to be considered as an execution of the power.’ Certainly it is not. But then this very statement leaves it open to inquire into the intention under all the circumstances; which seems to me to be the true and sensible rule upon the subject; and when that question is thus once ascertained, it governs. So, it was expressly held, in *Pomeroy v. Partington* (3 Term. R. 665); and in *Griffith v. Harrison* (4 Term. R. 737, 748, 749), the court expressly repudiated the notion that any technical exposition was to be given to the words of a will executing a power, and held, that the intention was to be collected from the words according to the ordinary and common acceptance thereof. And again, in *Bailey v. Lloyd* (5 Russ. R. 330, 341), the court held, that the question of the execution of a power by a will was a mere question of intention, and that intention was to be collected, not from a particular expression, but from the whole will. (See 4 Kent’s Comm. Lect. 62, p. 333, 334, 4th edit.) Now, Sir Edward Clere’s case (6 Co. R. 17) is not only unquestionable law, and has so been always held, but it affords a strong illustration of the true doctrine. In that case, it was held, that the power was well executed, notwithstanding it was not referred to, because otherwise the devise in the will would be inoperative and void. The testator had no estate in the property devised, but only a power over it; and so, *ut res magis valeat, quam pereat*, it was held, that he intended to execute the power. Nor is there any objection to the doctrine of Lord Chief Justice Hobart, in the *Commendam* case (Hob. R. 159, 160), that, ‘if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest and not to the power.’ This is but saying in other words, that, where the terms of a devise are perfectly satisfied and inoperative, without any reference to the execution of a power, by working on the interest of the testator in the land,—there it shall not be deemed that he intended to execute the power, but merely to pass his interest. This proceeds upon the plain ground, that there is nothing

arisen.¹] Thus, for example, where a testator directed that, if his personal estate and house and lands at W. should not pay his debts, then his executors should *raise* the same out of his copyhold estate; it became a question whether the terms of the power authorized a *sale* of the copyhold estate. It was held that they did.²

§ 1064. If a will should contain a direction or power to raise money out of the rents and profits of an estate, to pay debts or portions, &c., a question might then arise, whether such a power would authorize a sale or mortgage of the estate under any circumstances; as, for instance, if it were otherwise impracticable, without the most serious delays and inconveniences, to satisfy the purposes of the trust. Now, this is a point upon which great authorities have entertained opposite opinions. The old cases generally inclined to hold, that the power should be restricted to the

in the will which shows any intention to execute the power; and, in cases of doubt, the court cannot deem it a good execution of the power. (See 4 Kent's Comm. Lect. 62, p. 333, 334, 4th edit.) Sir Edward Sugden (Sugden on Powers, vol. 1, ch. 6, § 7, p. 402, 428) has critically examined and commented upon all the leading authorities; and it appears to me that his criticisms (and he is himself a very high authority upon this subject) are entirely well founded. The courts have, indeed, as he abundantly proves, proceeded in some cases upon very narrow and technical grounds, and in others have adopted a more liberal and just interpretation; and the cases do not all well stand together. The rule of ascertaining the intention, however, has been recognized at all times; and, as Lord Kenyon has well observed in *Pomeroi v. Partington* (3 Term R. 674, 675), if the judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them. In a conflict of authorities, I own that I should choose to follow those which appear best founded in the reason and analogies of the law. But in cases of wills, where the intention is to govern, no authorities ought to control the interpretation which the court is called upon to make, unless all the circumstances are the same in both cases, and the ground of interpretation in one is entirely satisfactory to the mind, as applied to the other. If I were compelled to decide between the cases of *Wallop v. Lord Portsmouth* (Sugden on Powers, ch. 6, § 7, p. 394), *Standen v. Standen* (2 Ves. Jr. 589), *Lewis v. Llewellyn* (2 Lord Kenyon's R. 544, by Harmer), and the case of *Jones v. Curry* (1 Swanst. R. 66), if there should be any dissonance between them, I should much incline to follow the former."

¹ See Sugden on Powers, ch. 9, § 2 to 8, p. 437 to 454 (3d edit.); 1 Madd. Ch. Pr. 283; 2 Powell on Devises, by Jarman, 644 b.

² *Bateman v. Bateman*, 1 Atk. 421.

mere application of the annual rents and profits.¹ The more recent cases hold to a more liberal exposition of the power, so as to include in it, if necessary for the purposes of the trust, a power to sell or to mortgage the estate.² Lord Eldon has significantly said, with reference to the case of a direction by a testator to pay debts and legacies out of the rents and profits of a term of five hundred years, created by his will, that if he were asked, out of Westminster Hall, what the testator meant by rents and profits, he should say, that he probably meant the annual profits only. But that it was a settled rule, that, where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents; but the trustees are to raise it out of the estate itself by a sale or mortgage.³ Sir Thomas Plumer, speaking on the same subject, has also said: "Whatever might have been the interpretation of these words, had the case been new; whatever doubt might have arisen upon them, as denoting annual or permanent profits, it is now too late to speculate; this court having, by a technical, artificial, but liberal construction, in a series of authorities, admitting it not to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a fixed time, when it must be raised and paid without delay, to a power to raise [by sale or mortgage, unless restrained by other words." ⁴

§ 1064 *a.* But the true exposition of the modern doctrine, established in courts of equity on this subject, does not in reality deserve to be deemed either technical or artificial, although it is certainly a liberal construction of the words of the testator, in order to accomplish his intent. When a testator directs a gross sum

¹ *Ivy v. Gilbert*, 2 P. Will. 13, 19; *Trafford v. Ashton*, 1 P. Will. 418, and Mr. Cox's note; *Evelyn*, 2 P. Will. 666 to 670, 672; *Mills v. Banks*, 3 P. Will. 1; *Okeden v. Okeden*, 1 Atk. 550, and Mr. Saunders's note.

² *Green v. Belchier*, 1 Atk. 505; *Baines v. Dixon*, 1 Ves. 42; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. Jr. 233, 234; S. C. 3 Bro. Ch. R. 120; *Trafford v. Ashton*, 1 P. Will. 415, 419; *Allen v. Backhouse*, 2 Ves. & Beam. 65, 76; 1 Madd. Ch. Pr. 481, 484 to 486. The cases are fully collected in Mr. Jarman's note to 1 Powell on Devises, 234, to which the learned reader is therefore referred.

³ *Allen v. Backhouse*, 2 Ves. & Beam. 64, 74.

⁴ *Bootle v. Blundell*, 1 Meriv. R. 193, 232, 233.

to be raised out of the rents and profits of an estate at a fixed time, or for a definite purpose or object, which must be accomplished within a short period of time, or which cannot be delayed beyond a reasonable time, it is but fair to presume, that he intends that the gross sum shall at all events be raised, so that the end may be punctually accomplished; and that he acts under the impression, that it may be so obtained by a due application of the rents and profits within the intermediate period. But the rents and profits are but the means; and the question, therefore, may properly be put, whether the means, if totally inadequate to accomplish the end, are to control the end, or are to yield to it. Now, if the gross sum cannot be raised out of the rents and profits at all, or not so soon as to meet the exigency contemplated by the testator, it would seem but a reasonable interpretation of his intention, to presume that he meant to dispense with the means, and, at all events, to require the sum to be raised. The same principle is applied by courts of equity in other analogous cases; as, for example, in cases of charities, where the doctrine of *cy pres* is applied,¹ and to cases of elegits on judgments, and to other cases, where the debt cannot be paid at all out of the rents and profits, or not within a reasonable time.²

§ 1064 *b*. Upon the like principles, where a testator, by his will, charged his real estates with the payment of his debts generally, and then devised the same estates to trustees in trust for other persons, and a question arose, in what manner the charge for the payment of debts was to be satisfied; and whether the trustees had authority to sell or mortgage the estates, or a part thereof, for the payment of the debts; it was held, by the court, that the trustees had power to sell or to mortgage the real estates for the payment of the debts, as they should think it best for the interest of all concerned in the real estates.³

¹ *Post*, § 1169 to 1171, 1176 to 1178.

² *Post*, § 1216 *a*, 1216 *b*.

³ *Ball v. Harris*, 4 Mylne & Craig, R. 264. On this occasion, Lord Cottenham said: "In support of the appeal, it was not disputed, that the directions in the will constituted a charge of the debts upon the real estate. But it was contended, first, that such a charge did not give a power to sell; secondly, that if it did, the lands purchased were not subject to it; and, thirdly, that the power to sell, if it existed, did not authorize the mortgage to the plaintiff. The affirmative of the first proposition was acted upon by the Master of the Rolls, in *Shaw v. Borrer*, 1 Keen, 559; and the real question is, Was that decision right? I have carefully

[* § 1064 c. A power to raise money by sale or mortgage of real estate held to authorize a mortgage with a power of sale.¹ But a devise of real estate to trustees, in fee, "out of the rents, issues, and profits," "and such other means (except a sale) as they may think proper, to levy and raise sufficient to pay off the charges on the estate," does not give the trustees power to raise the charges, either by sale or mortgage, or by leases on fines, but they must be raised out of the rents, and the profits of timber and mines.² And where the testator charged certain of his lands with the payment of a mortgage upon other lands, (which he also devised specially,) and with the payment of his debts generally, but gave no express power of sale, it was held the executor took a power of sale by implication, and that the purchaser of the executor took the land discharged of all equity in favor of the devisee.³]

considered the judgment of the Master of the Rolls upon this point, and I entirely concur with him upon it. The point, indeed, has been long established. It arose directly in *Elliott v. Merryman*, Barnard, 78, and, as there laid down, has been recognized in the several cases referred to by the Master of the Rolls; to which may be added the opinions of Lord Thurlow and Lord Eldon in *Bailey v. Ekins*, 7 Ves. 319, and *Dolton v. Hewen*, 6 Madd. 9; for although the point in some of those cases was, whether the purchaser was bound to see to the application of the purchase-money, the decision that he was not assumes that the sale was authorized by the charge in the will of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for the payment of them. The case, indeed, is free from the difficulty which has occurred in some others, for Harris is devisee in trust of the legal fee; and it being established, that the will charges the estate with the payment of the debts, it follows that Harris, being trustee for that purpose, must have the power of executing his trust. Such being my opinion, as to the effect of the charge of the debts upon the estate, it is unnecessary to advert to the express power to sell with the approbation of the widow and daughter, both of whom are parties to the deposit of the deeds with the plaintiff; for it cannot be doubted, but that the purchased lands are subject to the same trusts as the land devised; — and this disposes of the second point. The third point is equally untenable; namely, that the right of the trustee to sell did not authorize the mortgage. So long ago as the case of *Mills v. Banks*, 3 P. Will. 1, in 1724, it seems to have been assumed as settled, that 'a power to sell implies a power to mortgage, which is a conditional sale'; and no case has been quoted, throwing any doubt upon that proposition. But this is not a mere power to sell; it is a trust to raise money out of the estate to pay debts. It would, indeed, be most injurious to the owners of estates charged, if the trustee could effect the object of his trust only by selling the estate."

¹ [* *Bridges v. Longman*, 24 Beavan, 27.

² *Bennett v. Wyndham*, 23 Beavan, 521.

³ *Robinson v. Lowater*, 5 De G. M. & G. 272.]

§ 1065. In the next place, independently of the consideration of powers, many very embarrassing questions arise as to the nature and extent of the limitations of trust, properly so called under last wills ; as to the persons who are to take ; and also as to the interest they are to take in the trust property. Many of these trusts require the positive interposition and direction of courts of equity, before they can be properly or safely executed by the parties in interest, so as to protect them against future litigation and controversy. And it not unfrequently happens, that the final administration, settlement, and distribution of the assets of the testator, real and personal, must stand suspended, until the aid of some court of equity has been invoked, and a decretal order is obtained, containing a declaration of the nature and extent of these trusts, of the parties who are entitled to take, and of the limitations of their respective interest ; and also providing means, by reference to a master, whereby the cross equities and conflicting claims of various persons, such as creditors, trustees, legatees, devisees, heirs, and distributees, may be clearly ascertained and definitely established.¹ Thus, for example, upon a will, creating a trust for the payment of debts, and charging them, as well as legacies, upon the real estate of the testator, it may often be a matter of serious difficulty to ascertain, from the words of the will, whether the personal estate is to be wholly exonerated from the payment of the debts and legacies ; or whether it is to be the primary fund, and the real estate only to be auxiliary thereto. And in each case, if the charges on the real estate are not sufficient to exhaust the whole, in what manner the charges are to be borne and apportioned among the different devisees and heirs.² Until these questions are settled by a court of equity, upon a bill bringing all the proper parties before it, it will be impossible for the executors or trustees (as the case may be) to proceed to a final settlement of the various claims, without manifest danger of having all their proceedings overhauled in some future suit.³

¹ This subject has been already somewhat considered under the heads of Account, Administration, Legacies, and Marshalling of Securities. *Ante*, ch. 8, 9, 10, 13.

² See 2 Powell on Devises, by Jarman, ch. 35, p. 664 to 714, and notes ; 1 Madd. Ch. Pr. 466 to 488.

³ Some of these difficulties have been already touched, in considering the doctrines respecting the marshalling of assets and securities. *Ante*, § 558 to 580, 633

§ 1065 a. Another illustration of the difficulties arising from the language of particular bequests may be gathered from a recent case, where the testator bequeathed to his wife £600 per annum during her life, and after her death, the said annuity to be equally divided between A., B., C., D., E., and F., or the survivors or survivor; and the question arose, whether the six annuitants were to take annuities for their lives, or were to take the capital stock of such sum in the three per cents in England as would be sufficient to produce the yearly sum of £600. It was held by the Vice-Chancellor, that the annuitants were entitled to such capital stock, as an absolute interest vested in them, and not to mere life annuities. But this decision was reversed by the Lord Chancellor, upon the ground, that, upon the true interpretation of the will, the annuitants were such for their respective lives only.¹ [In a

to 645. See, also, the notes of Mr. Cox to *Howell v. Price*, 1 P. Will. 294, note (1), and to *Evelyn v. Evelyn*, 2 P. Will. 664, note (1), as to the point whether the personal estate is to be deemed the primary fund for the payment of debts and legacies, or not. See, also, 1 Madd. Ch. Pr. 467 to 488; *Id.* 498 to 506.

¹ *Blewitt v. Roberts*, 10 Simons, R. 491; S. C. on appeal, 1 Craig & Phillips, 274. See *Yates v. Madden*, 8 Eng. Law & Eq. R. 180, 263; *Stokes v. Huron*, 2 Dru. & W. 89; 12 Cl. & F. 171. *Tweedale v. Tweedale*, 10 Simons, R. 453. In this last case the Vice-Chancellor said: "I do not see any substantial difference between a gift of an annuity out of personal estate generally, and a gift of an annuity, to be satisfied out of a particular fund; because an annuity, when it is given generally, is to be provided for out of all the personal estate; and, if a gift of £ 300 a year, out of the testator's funded property, would give to the annuitant the absolute interest in so much of the funded property as would produce £ 300 a year, what is the substantial difference between that gift and a gift of £ 300 a year, simply, to be satisfied out of so much of the personal estate as would produce the sum? I confess that I do not see any difference myself. I am very much inclined to think, that the true construction is, that if it is given simply, it is given absolutely." But the Lord Chancellor, upon the appeal in *Blewitt v. Roberts*, said: "There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptance of the term used, if it should be said, that a testator had left another an annuity of £ 100 per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of £ 100; that is, of as many sums of £ 100 as the donee shall live years. In *Savery v. Dyer*, Ambl. 139, Lord Hardwicke says: 'If one give by will an annuity not existing before, to A., A. shall have it only for life.' In that case, the gift was of an annuity to A. during the life of B., and B. having survived A., the question was, whether the annuity had ceased, notwithstanding the express provision that it should be during the life of B. It is singular, that no other case has been referred to, in which this ques-

later case, a bequest to A., "of one clear annuity of £100 per annum, for and during his natural life; and should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother," was construed by the Lord Chancellor, reversing the decision of the Vice-Chancellor, to give the child of A. an annuity for life only, and not a perpetual annuity.¹]

§ 1065 *b*. Very embarrassing questions also often arise under

tion distinctly arose; but, in *Innes v. Mitchell*, 6 Ves. 464, before Sir W. Grant, and before Lord Eldon (9 Ves. 212), upon appeal, the annuity was held to be for life only, although there were provisions, leading more strongly than anything in this case, to an inference that the capital was intended to be given, such as the direction as to the £5,000; without that direction, the gift would be of an annuity of £200 to the use of a mother and her children, for her and their use, and the longest liver of her and her children, subject to an equal division of the interest, while more than one of them should live; a gift not very dissimilar from the present; and both those very able judges held, that the annuity determined with the life of the survivor. If the gift simply of an annuity of £100 to A. is a gift of that sum, which shall be sufficient to produce £100 a year, there was sufficient, in *Innes v. Mitchell*, to give to the mother and her children such a sum as would be sufficient to produce £200 per annum, without reference to the provision as to the £5,000; and yet, notwithstanding that provision, it was held, that there was no gift of any principal sum. It seems to have been supposed, that the direction, that there should be an equal division of the annuity, implied, that the principal, producing the annuity, was to be the subject-matter of the division: but there was a similar direction in *Innes v. Mitchell*, and in *Jones v. Randall*, 1 Jac. & Walker, 100; and yet, in neither of those cases, was there any gift of the principal. It does not appear to me, that there is any inconsistency in the cases. To hold that a simple gift of an annuity to A. does not give an annuity beyond the life of A., is not inconsistent with holding that a gift of the produce of a fund, without limit as to time, gives the fund itself. In the former case, there is no allusion to any principal sum. It is, indeed, the course of this court to secure an annuity by investing a capital sum; but a testator, with an income much exceeding the annuity given, is not very likely to contemplate any such investment. He may, indeed, be without the immediate means of making it; as, for instance, if his whole property consisted of long leasehold. If a testator were minded to give £10,000, can it be supposed that he would set about effecting this object by giving £500 per annum to the intended legatee, without making any mention of the £10,000, or of any other capital sum. To carry into effect the gift of an annuity of £500, by raising £10,000 out of the estate, would, probably, be very foreign from the testator's intention. I feel no disposition to question the doctrine laid down by Lord Hardwicke, and followed in the cases I have referred to; and if I did, I should not feel at liberty to depart from a rule established upon such authority."

¹ *Yates v. Madden*, 8 Eng. Law & Eq. R. 178. [* See, also, *Langley v. Thomas*; 6 De G. M. & G. 645; *Alexander v. Alexander*, Id. 593.]

last wills and testaments in respect to the persons who are entitled to take under words of general descriptions ; as, for example, under bequest to "children," to "grandchildren," to "younger children," to "issue," to "heirs," to "next of kin," to "nephews and nieces," to "first and second cousins," to "relations," to "poor relations," to the "family," to "personal representatives," and to "servants." For these words have not a uniform fixed sense and meaning in all cases ; but they admit of a variety of interpretations, according to the context of the will, the circumstances in which the testator is placed, the state of his family, the character and reputed connection of the persons who may be presumed to be the objects of his bounty, and yet who, only in a very lax and general sense, can be said to fall within the descriptive words. Thus, "child" or "children" is sometimes construed to mean "issue" ; and "issue" to mean "children" ;¹ "heirs" is sometimes construed to mean "children" ;² "next of kin" is sometimes construed to mean next of blood, or nearest of blood, and sometimes only those who are entitled to take under the statute of distributions, and sometimes to include other persons ;³ "relations" is sometimes construed to mean the "next of kin," in the strict sense of the words, and sometimes to include persons more remote in consanguinity ; "personal representatives" is sometimes construed to mean the "administrators or executors," and sometimes to mean the "next of kin" ;⁴ "executors" sometimes in-

¹ See *Pope v. Pope*, 9 Eng. Law & Eq. R. 193, where "issue" was limited to children.

² *Head v. Randall*, 2 Younge & Coll. 231 ; *Minter v. Wraith*, 13 Simons, R. 52.

³ *Withy v. Mangles*, 10 Clark & Finnel. 215 ; *Cholmondeley v. Ashburton*, 6 Beavan, 86.

⁴ *S. P. Daniel v. Dudley*, 1 Phillips, Ch. R. 1, 6. In *Holloway v. Clarkson*, 2 Hare, R. 521, 523, Mr. Vice-Chancellor Wigram said : "The disputed cases have generally arisen out of bequests to 'representatives,' 'legal representatives,' 'personal representatives,' and similar words, and not upon the words 'executors, administrators, and assigns,' which occur in the present case. In *Bulmer v. Jay* (4 Sim. 48 ; S. C. 3 Myl. & K. 197), and in some other cases, however, a question has arisen upon the effect of the words 'executors and administrators.' If I were compelled to give an opinion upon this part of the case, I should say, that the conclusion to be drawn from the more modern, not unsupported by some of the earlier cases, is this : that under a gift simply to 'representatives,' 'legal representatives,' 'personal representatives,' and to 'executors and administrators,' the hand to receive the money is that of the person constituted representative by the

cludes the persons named as executors in the will, and sometimes only such as take upon themselves that office ; and “ nephews and

Ecclesiastical Courts ; but that such person will, in the absence of a clear intention to the contrary, take the property as part of the estate of the person whose representative he is, and not beneficially. *Evans v. Charles*, 1 Anst. 128. [In *Long v. Watkinson*, 10 Eng. Law & Eq. R. 72, the Master of the Rolls said that *Evans v. Charles*, after being long doubted, had been overruled by several authorities.] *Ripley v. Waterworth*, 7 Ves. 425 ; *Wellman v. Bowring*, 1 Sim. & Stu. 24 ; 2 Russ. 374 ; 3 Sim. 328 ; *Price v. Strange*, 6 Madd. 159 ; *Palin v. Hills*, 1 Myl. & K. 470 ; *Hames v. Hames*, 2 Keen, 646 ; *Grafftey v. Humpage*, 1 Beav. 46 ; *Mackenzie v. Mackenzie*, 8 Eng. Law & Eq. R. 69 ; *Daniel v. Dudley*, 1 Phillips, R. 1 ; 11 Sim. 163. In the last case, Lord Cottenham strongly expressed his disapprobation of *Bulmer v. Jay*. However, the decision upon these cases has been by no means uniform. And in *Long v. Watkinson*, 10 Eng. Law & Eq. R. 72, Sir John Romilly said, ‘ I cannot reconcile *Palin v. Hills* with *Daniels v. Dudley*, and other cases of that class.’ It has sometimes been decided that the persons intended were the representatives constituted by the Ecclesiastical Court ; sometimes, that next of kin were intended ; sometimes, that the representatives by the Ecclesiastical Court took beneficially ; and sometimes, that they took as representatives, and consequently as trustees for the estates of the party whose representatives they were. It will be sufficient to refer to the cases generally, as they are collected in *Saberton v. Skeels*, 1 Russ. & Myl. 587, and in *Grafftey v. Humpage*. In considering the cases as they bear only upon the construction of the words (as words of description) and upon the question of the interest which the legatee takes, it will be found convenient to distinguish the cases in which a legacy has been given to an individual ; and in case of his predeceasing the testator, his representatives have been substituted for him, from the case of direct limitations to the representatives of an individual named not by way of substitution. In the former cases, the courts appear to have treated the representatives as *quasi* purchasers, and have thereby excluded all argument upon the words as words of limitation.” See, also, *Booth v. Vicars*, 1 Collyer, Ch. R. 6 ; where the question was, Who, in the sense of the will, were the “ next legal representatives ” ? Mr. Vice-Chancellor Bruce there said : “ The next question is, whether the true construction of the bequest is, that the executors of Nicholas Vicars and Mary Brown were intended to take in their character of executors or administrators, that is, not beneficially ; a meaning of which, when the context allows or does not forbid it, the words ‘ legal representatives ’ are susceptible. There are several remarks, however, to which this clause is liable, which seem to exclude that interpretation also. For, in the first place, I do not say in materiality, but in order, the words ‘ executors or administrators ’ are used just above for another purpose, in their strict, legal, and proper sense, and therefore, if he had meant executors and administrators here, the probability is, that he would have used the same phrase. In the second place, he has used the word ‘ next ’ in combination with the words ‘ legal representatives,’ which is a word having no connection with the character of executor or administrator. And, thirdly, that construction would render the latter half of the bequest mere superfluity, because, supposing that by the words in question executors or administrators are meant, the fund would go

nieces" will sometimes include great-nephews and great-nieces.¹ The word "family" admits of a still greater variety of applications.

in the same way without those words as with them. These are part of the considerations which seem to me to exclude that construction also. It follows, if this view of the subject be right, that the words 'next legal representatives' must in this will import, in some form, consanguinity; the next question is, in what form? Now the words here are not 'next of kin.' There is no word strictly importing kindred. If the words had been 'next of kin,' or 'nearest,' or 'next in relationship,' it is possible that I might have applied the rule adopted by the Lords Commissioners in *Elmsley v. Young*, and have held that the representatives of whom the statute speaks were excluded. But that is not so. The words 'legal representatives' are in the very words which in the statute of distributions are used to designate persons, who, being of kindred to the deceased, come in as representatives of some one else. As to this part of the case, I need do no more than refer to the language of the Master of the Rolls in *Rowland v. Gorsuch*, 2 Cox, 187, and to the expressions so recently used by Lord Langdale in *Cotton v. Cotton*, 2 Beav. 70, where he says: "When it is said that the expression 'legal representatives,' means 'next of kin,' it is not that such is the force of the words themselves, but because the words are held to indicate the persons, who, upon the construction of the will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. I must, therefore, refer to the statute of distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words.' I also am of opinion upon this will, that the words 'next legal representatives' mean the persons, who, by force of law, in right of consanguinity, would take the personal estate of those persons beneficially. The next question is, whether they are to take *per stirpes* or *per capita*. My opinion is, that they take *per stirpes*. The word 'representatives' itself almost forces that interpretation; and when you consider that, if one of the two persons mentioned in the will had survived the tenant for life, only a moiety could have gone under the clause of substitution, that construction seems to be rendered absolutely necessary."

¹ In Mr. Chitty's Digest, under the title *Wills and Devises*, XV. b., a great variety of cases, illustrating these statements, will be found collected. See also Bridgman's Digest, Legacy and Legatee; 1 Roper on Legacies, § 1 to 19, p. 24 to 167. Examples of the interpretation of these words will be found in *Hall v. Luckup*, 4 Sim. R. 5; *Dalzell v. Welch*, 2 Sim. 319; *Horridge v. Ferguson*, 1 Jacob, R. 583; *Lees v. Mosley*, 1 Younge & Coll. 589; *Earl of Oxford v. Churchill*, 3 Ves. & Beam. 59; *Lady Lincoln v. Pelham*, 10 Ves. 166; *Bowles v. Bowles*, 10 Ves. 177; *Gittings v. McDermott*, 2 Mylne & Keen, 69; *Mounsby v. Blamire*, 4 Russ. R. 384; *Leigh v. Norbury*, 13 Ves. 340; *Sibley v. Perry*, 7 Ves. 522; *Grant v. Lyman*, 4 Russ. R. 292; *Brandon v. Brandon*, 3 Swanst. 319; *Smith v. Campbell*, 19 Ves. 400; *Mahon v. Savage*, 1 Sch. & Lefr. 111; *Pope v. Whitcome*, 3 Meriv. R. 689; *Cruwys v. Colman*, 9 Ves. 319; *Worseley v. Jonson*, 3 Atk. 761; *Elmsley v. Young*, 2 Mylne & Keen, 82; *Palen v. Hills*, 1 Mylne & Keen, 470; *Price v. Strange*, 6 Madd. R. 159; *Piggott v. Green*, 6 Sim. 72; *Barnes v. Patch*, 8 Ves. 604. [In *Mayor of Hamilton v. Hodsdon*, 11 Jurist, 193, before the Privy Council, a mistake in the report of *Barnes v. Patch*, is noticed.

It may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters, or next of kin; or it may mean the genealogical stock from which he may have sprung.¹

[* § 1065 *c.* In a recent case, before the Lord Chancellor, after a good deal of examination and discussion at the bar, it was held that a bequest to "cousins," simpliciter, includes first cousins only, in the absence of anything to explain the meaning of the testator. The Lord Chancellor said, "I think that if a testator says no more than that he gives to 'cousins,' he must be taken to mean first cousins. That will be a practical construction, and one by which the parties entitled will be easily ascertained: it coincides too with ordinary experience, for when a person speaks of cousins, he generally means first cousins, the children of an uncle or aunt; and I think that in the present case there being first cousins (and nothing to indicate that any others were intended), this is the proper construction to adopt." It seems to us this view, as a general exposition of the difficulty, is extremely satisfactory.² The counsel, in arguing the extension of the term "cousins," so as to include all persons coming within the general import of the term, referred to the following cases,³ not elsewhere cited in this work. The same construction was given to the word "niece."⁴ And in order to enable illegitimate children to take under a bequest to "daughters," it would seem to be requisite to show that there were no other persons who could answer the description, and that their reputed character did answer it, and that this was un-

Crossly v. Clare, Ambl. 397; *Chambers v. Brailsford*, 18 Ves. 368; *S. C.* 19 Ves. 652; *Mayott v. Mayott*, 2 Bro. Ch. R. 125; *Charge v. Goodyer*, 3 Russ. R. 140; *Silcox v. Bell*, 1 Sim. & Stu. 301; *Chilcot v. Bromley*, 12 Ves. 114; *Gill v. Shelley*, 2 Russ. & Mylne, 336; *Langston v. Langston*, 8 Bligh, R. 167; *Clopton v. Butman*, 10 Simons, R. 426; *Head v. Randall*, 2 Y. & Coll. New R. 231; *Liley v. Hay*, 1 Hare, 58, 582; *Wright v. Atkyns*, Turn. & Russ. R. 156; *Wood v. Wood*, 3 Hare, R. 65.

¹ *Blackwell v. Bull*, 1 Keen, R. 176, 181; *Lewin on Trustees*, 78, 79.

² [* *Stoddart v. Nelson*, 6 De G. M. & G. 68; *Stanger v. Nelson*, *Ib.*

³ *Caldecott v. Harrison*, 9 Simons, R. 457; *Sanderson v. Bayley*, 4 My. & Cr. 56; and *Williams on Executors*, Vol. 2, p. 885, 3d ed. See also *Thompson v. Robinson*, 5 Jur. N. S. 1196.

⁴ *Crook v. Whitley*, 7 De G. M. & G. 490. See also *Pride v. Fooks*, 3 De Gex & Jones, 252; and *Jenkins v. Lord Clinton*, 26 Beavan, 108, *Smith v. Lidiard*, 3 Kay & J. 252.

derstood by the testator, which last fact will not be inferred.¹ A gift to “my other nephews and nieces on both sides,” was held to include the children of the brothers and sisters of the testator’s wife.² And when, by the subsequent codicils, it appeared that in regard to one great-nephew, the testator intended he should take a portion of his residue under the general denomination of nephews, it was held that under the terms “nephews and nieces” the testator intended to embrace great-nephews and great-nieces.³]

§ 1065 *d*. Difficulties may also arise in many cases, where there is a bequest or devise to the next of kin, whether they are to take *per stirpes* or *per capita*.⁴ So, also, it may be matter of question, who are to be deemed the next of kin, under bequests of personal property; whether the next of kin under the civil law, or the next of kin under the statute of distributions; for they may not be identical.⁵ In all these cases, the true meaning, in which the testator employed the words, must be ascertained by considering the circumstances in which he is placed, the objects he had in view, and the context of the will.⁶ Where the bequest respects personal or trust property, it naturally, nay, necessarily, falls within the juris-

¹ *Herbert in re*, 6 Jur. N. S. 1027. How far illegitimate children, or their children shall take, by general description, is matter of intention. *Allen v. Webster*, 6 Jur. N. S. 574. But illegitimate children, born after the date of the will, cannot take by general description, as “such other child that may be born of my housekeeper,” &c. *Medworth v. Pope*, 5 Jur. N. S. 996. During the present year (1861), a legacy to the “sons and daughters of A. B. living at my death,” there being three sons and one daughter of A. B. living at the decease of the testator, and one of the sons and the daughter being illegitimate, it was held, that the illegitimate daughter took the legacy, but the son was excluded. The learned judge, Sir John Romilly, M. R., thus concludes his judgment: “The result is necessarily somewhat anomalous, for I admit one of the illegitimate children and exclude the other. It is to be observed there are two legitimate sons sufficient to satisfy the word “sons” in the plural. I regret the decision to which I feel myself obliged to come, because it is evident the testator intended to include all the children of his cousin, whether legitimate or illegitimate.” *Edmunds v. Fessey*, 7 Jur. N. S. 282.

² *Frogley v. Phillips*, 6 Jur. N. S. 641.

³ *Weeds v. Bristow*, 12 Jur. N. S. 446.]

⁴ *Mattison v. Tanfield*, 3 Beavan, R. 131; *Paine v. Wagner*, 12 Simons, R. 184.

⁵ See on this point, 2 *Jarman on Wills*, p. 37; *Law Magazine* for May, 1844, p. 353, 354, 355; *Elmsley v. Young*, 2 Mylne & Keen, 786; *Smith v. Campbell*, 19 Ves. 403; *Wilthey v. Mangles*, 4 Beavan, 366; S. C. 8 (English) *Jurist*, p. 69. In this case, the subject was much discussed by Lord Langdale.

⁶ *Blackwell v. Bull*, 1 Keen, R. 176, 181; *O'Dell v. Crone*, 3 Dow, Parl. R. 61.

diction of courts of equity to establish the proper interpretation of such descriptive words in the particular will; and neither executors, nor administrators, nor trustees, can safely act in such cases, until a proper bill has been brought, to ascertain the true nature and character of such bequests or trusts, and to obtain a declaration, from the court, of the persons entitled to claim under the general descriptive words. Where, indeed, the estate, to which the descriptive words apply, is of a legal nature, the interpretation thereof may well belong to courts of law. But, even in such cases, from the inability of those courts to bring all the proper parties before them in a single suit, as well as from the mixed nature of the subject-matter of the bequest, the questions are most commonly discussed and settled in a declaratory suit before some court of equity.

1065 *e.* Equally embarrassing questions sometimes arise in cases of residuary legatees, whether they are to take all the personal estate which the testator has not absolutely and effectually disposed of, or, it is to be treated as intestate property undisposed of. In the cases of lapsed legacies, the doctrine is clearly settled, that they belong to the residuary legatees, because their interest is abridged only to the extent of the particular effective legacies. And the same rule seems properly to apply to cases where the testator intended that a legatee should be benefited by a particular bequest, but the legatee cannot be ascertained, or the legacy is too vague, and void for uncertainty; for, in such a case, the mere intention that the residuary legatees should not take the whole, will not defeat their right to such a legacy.¹

§ 1066. There are also some rules of construction of the words of wills, adopted by courts of equity in relation to trusts, which are different from those which are adopted by courts of law in construing the same words in relation to mere legal estates and interests. We have already had occasion to take notice of this distinction, in remarking upon the difference between executed and executory trusts. In the former, courts of equity follow the rules of law in the interpretation of the words; in the latter, they often proceed upon an interpretation widely different.²

¹ The Mayor of Gloucester *v.* Wood, The (English) Jurist for 23d Dec. 1843, p. 1125, 1128.

² *Ante*, § 974; 1 Madd. Ch. Pr. 440, 441, 445 to 465; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and note (*i*).

§ 1067. In regard also to legacies and bequests of chattels and other personal property, courts of equity (as we have seen) treat all such cases as matters of trust, and the executor as a trustee for the benefit of the legatees, and, as to the undisposed residue of such property, as a trustee for the next of kin.¹ The rules, therefore, adopted by courts of equity, in expounding the words of wills in regard to bequests of personal property, are not precisely the same as those adopted by courts of law in interpreting the same words as to real estate. For courts of equity, having, in a great measure, succeeded to the jurisdiction of the ecclesiastical courts over these matters, and these courts, in the interpretation of legacies, being governed by the rules of the civil law, courts of equity have followed them in such interpretation, rather than the rules of the common law where they differ.²

§ 1067 *a*. Cases may easily be put to show how widely courts of equity sometimes differ from courts of law in their construction of the same words in a will as applied to real estate, and as applied to personal estate, giving effect to the presumed intent of the testator to an enlarged and liberal extent, not recognized at law. Thus, for example, if freehold and leasehold estates are devised to a person and the heirs of his body, with a limitation over, in case he leaves no such heirs, the words will, or at least may, be construed to mean, a dying without leaving such heirs indefinitely, as to the freehold estates, and a dying without leaving such heirs living at the time of his death as to the leasehold estates; the effect of which will be very different in the two different species of estates, as to the title of the devisee, and the validity of the limitation over.³ Where the remainder over is upon an indefinite failure of such heirs, the first devisee takes an estate tail with a vested remainder over upon the determination of that estate. Now, such a remainder over, after an estate tail, in freehold estates, is valid in point of law, and awaits the regular determination of the prior estate. But

¹ *Ante*, § 593, 595, 596; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*), 1; Id. B. 2, ch. 5, § 3, and note (*k*); 1 Madd. Ch. Pr. 466, 467; *Post*, § 1067 *a*.

² *Ante*, § 602; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and notes (*h*), (*i*); Ib. § 5, and note (*l*); Ib. § 6, and note (*o*); Ib. § 7, and notes (*q*), (*r*), (*s*); Id. § 9, and note (*y*); Id. § 11, and note (*a*); Fearne on Cont. Rem. 471, 472 (7th edit.), by Butler, and Butler's note (*s*), p. 474; Id. p. 476; *Crooke v. De Vandes*, 9 Ves. 197.

³ See *Forth v. Chapman*, 1 P. Will. 664; Fearne on Conting. Rem. 472 to 485, 7th edit. by Butler, and his note (*s*); *Crooke v. De Vandes*, 9 Ves. 197, 203, 204.

in leasehold estates, it is void, as being too remote, and the tenant in tail takes the whole estate; whereas, if the devise is construed to be a dying without issue living at the decease of the first devisee, then, in each case, the legal effect is the same. The devise over will be treated as a good contingent remainder to take effect, if at all, at the death of the first devisee. The reason of this difference, is, that, in chattels, whether personal or real, there can be no good remainder limited over after an estate tail, as the tenant in tail is deemed to be the absolute owner. But in freeholds, there may be a good remainder after an estate tail by the statute *de donis*; and the tenant in tail is deemed to be only the qualified owner.¹

[* § 1067 *b*. This subject is a good deal discussed by the Lord Chancellor, Cranworth, and the Lords Justices in a case before the Court of Chancery Appeal,² and the leading cases cited and commented upon, from the earliest times. It was there held that a bequest to a married woman of an annuity "for her life and the issue lawfully begotten from her body, on failure of which to revert to my heirs," with a request that K. and C. would act as trustees for such married woman, so that the annuity might be secured for her sole use and benefit, gave her a life-interest only, with a gift in the nature of a remainder to her issue; and that the Court of Chancery, in construing a disposition of personal estate by will, is not to be absolutely governed by the rules which would be applicable, at law, in the case of real estate. The rule laid down by Lord Thurlow,³ that in such cases the heirs shall be regarded as taking by purchase and not by limitation, when that is the apparent purpose of the testator, is vindicated and maintained, notwithstanding it has been questioned in many of the subsequent cases.⁴ The

¹ *Forth v. Chapman*, 1 P. Will. 664; *Crooke v. De Vandes*, 9 Ves. 197, 203, 204; *Porter v. Bradley*, 3 T. R. 143; *Pells v. Brown*, Cro. Jac. 590; *Fearne on Conting. Remaind.* 472 to 485, *Butler's edit.* and note (s); *Id.* p. 5, note (d).

² [* *Wynch, ex parte*, 5 De G. M. & G. 188.

³ *Knight v. Ellis*, 2 Br. C. C. 570.

⁴ *Lyon v. Mitchel*, 1 Mad. R. 486, and cases cited. The Lord Chancellor here cites the following cases. *Tothill v. Pitt*, 1 Mad. 488; S. C. before the House of Lords, 7 Br. P. C. 453; *Elton v. Eason*, 19 Vesey, 73; *Britton v. Twining*, 3 Meriv. 176; *Chandless v. Price*, 3 Vesey, 99; *Attorney-General v. Bright*, 2 Keen, 57; *Tate v. Clarke*, 1 Beavan, 100; *Jordan v. Lowe*, 6 Beavan, 350; *Bird v. Webster*, 1 Drew. 338. And Mr. Justice Turner, who dissented in some respects from the views of his associates, but came to the same result, cited *Aubin v.*

same rule was adopted in the construction of a will giving leaseholds for life to A., and after her decease, to the issue of her body.¹ But where there is a gift of the absolute interest in personalty to the first donee, he will hold such estate exonerated from all charge, notwithstanding there may be a gift over depending upon some contingency.²]

§ 1068. In the interpretation of the language of wills also, courts of equity have gone great lengths, by creating implied or constructive trusts from mere recommendatory and precatory words of the testator. Thus, if a testator should, by his will, desire his executor to give to a particular person a certain sum of money, it would be construed to be a legacy; although the will should leave it to the executor's own free will, how, and when, and in what manner, it should be paid.³ So, if a testator should desire his wife, at or before her death, to give certain personal estate among such of his relations as she should think most deserving and approve of; it would be held to be a legacy among such relations.⁴ So, a bequest to a wife of all the testator's freehold and copyhold estates, being well assured that she will, at her decease, dispose of the same, amongst all, or such of my children as she, in her discretion, shall think most proper, and as they, by their future conduct towards her, shall be deserving of the same, would be held to be a trust for such of the children as she should appoint.⁵ So, a bequest of the testator's personal estate to a wife, and, if she

Daly, 4 B. & A. 59; Oates v. Cooke, 3 Burr. 1684; Trent v. Hanning, 1 Bos. & Pullen, N. R. 116; Doe v. Woodhouse, 4 T. R. 89; Mogg v. Mogg, 1 Meriv. 654; Dunk v. Fenner, 2 Russ. & Myl. 557; Hockley v. Mawby, 1 Vesey, Jr. 143; Darley v. Martin, 17 Jur. 1125; Forth v. Chapman, 1 P. Wms. 663; Clare v. Clare, Cas. Temp. Talb. 21; Warman v. Seaman, Finch, 279; Stafford v. Buckley, 2 Vesey, Sen. 170.

¹ Goldney v. Crabb, 19 Beavan, 338. See, also, Parker v. Clarke, 6 De G. M. & G. 104; Doe d. Dodson v. Grew, 2 Wils. 322. See, also, Hedges v. Harpur, 3 De Gex & Jones, 129; Stewart v. Jones, 3 De G. & J. 532.

² Andrews's Will, *in re*, 6 Jur. N. S. 114; *Ante*, § 604 a.]

³ Brest v. Offley, 1 Ch. Rep. 246.

⁴ Harding v. Glyn, 1 Atk. 469; Malvin v. Keighley, 2 Ves. Jr. 333; Brown v. Higgs, 8 Ves. 570, 571; Tibbits v. Tibbits, Jac. Rep. 317; Knight v. Knight, 3 Beavan, R. 148, 172, 173.

⁵ Massey v. Sherman, Ambler, R. 520, and Mr. Blunt's note; Parsons v. Baker, 18 Ves. 476; Prevost v. Clarke, 2 Madd. R. 458; Forbes v. Ball, 3 Meriv. R. 437. See 2 Roper on Legacies, by White, ch. 21, § 6, p. 373 to 379, and Lewin on Trusts, ch. 5, § 2, p. 77 to 81, where most of the cases are collected.

should marry again, to be secured to her separate use, and recommending the wife to give by her will what she should die possessed of, to certain persons, whom he named, would be held to create a trust in favor of such persons.¹ So, if a testator should give £1000 to A., desiring, wishing, recommending, or hoping, that he will, at his death, give the same sum, or a certain part thereof, to B., it would be held to be a trust in favor of B., and A. would be a trustee for him.² So, a bequest to a daughter, A., the wife of B., of £10,000, payable six months after the testator's decease, with the following words added; "I *recommend* to my said daughter and her said husband, that they do forthwith settle and assure the said sum of £10,000, together with all such sum of money as the said B. shall choose, for the benefit of my said daughter A., and her children," has been held to be a trust for the children after the decease of A., so that the legacy did not lapse, by the death of A., in the testator's lifetime.³

§ 1068 *a*. In short, it may be stated, as a general result of the cases, in the language of Lord Eldon, that, whether the words of the will are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects with regard to whom such terms are applied are certain, and the subjects of property to be given are also certain, the words are considered imperative, and create a trust.⁴ Or, as another learned judge has expressed it (in a form, indeed, open to some criticism): "Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."⁵

¹ Horwood *v.* West, 1 Sim. & Stu. 387.

² Knight *v.* Knight, 3 Beavan, R. 148, 172, 473.

³ Ford *v.* Fowler, 3 Beavan, R. 146. [A direction in a will that a certain person should be employed as agent and manager of the testator's estate, whenever his trustees should have occasion for the services of a person in that capacity, has been held not to create a trust which such person could enforce. Finden *v.* Stephens, 2 Phillips, Ch. R. 142.]

⁴ Paul *v.* Compton, 8 Ves. 380; Dashwood *v.* Peyton, 18 Ves. 41. See, also, Malim *v.* Keighley, 2 Ves. Jr. 333; Harland *v.* Trigg, 1 Bro. Ch. R. 142; Wynne *v.* Hank, 1 Bro. Ch. R. 179; 2 Fonbl. Eq. B. 2, ch. 2, § 4, note (x); Brown *v.* Higgs, 4 Ves. 709; S. C. 5 Ves. 495; 8 Ves. 561; Tibbits *v.* Tibbits, Jac. R. 317; 2 Madd. Ch. Pr. 6.

⁵ Lord Avonley, in Malim *v.* Keighley, 2 Ves. Jr. 335. See Meredith *v.* Henegage, 1 Sim. R. 542; Pierson *v.* Garnett, 2 Bro. Ch. R. 38, 45; Podmore *v.*

[* § 1068 b. In a recent case¹ before Vice-Chancellor Wood, this subject is a good deal discussed, and the later cases very thoroughly examined. And the learned judge adopts the language of Lord Cranworth, in *Williams v. Williams*.² “The real question in all these cases always is, whether the wish, or desire, or recommendation, that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.” And it is here argued that the language of Lord Truro, in *Briggs v. Penny*,³ in saying that, in all such cases, a certain subject and a certain object are necessary to constitute a trust, where the words used are precatory only, was not intended to imply that the objects intended must appear with certainty, but only that the testator had such objects in contemplation. And the learned judge concludes, that, although the certainty of both these incidents may clearly indicate the existence of a trust and so exclude the donee, the converse of that proposition is by no means true, that, however uncertain may be the objects of the testator’s bounty, if it clearly appear that such objects were intended by him to have the benefit of the gift, it will exclude the donee and create a trust. But it was also held, in this same case, that where a trust was created, excluding the donee, if it were too indefinite for the court to ascertain the object intended, it will carry the fund into the residuum of the estate, although that was given to the same person from whom it had been expressly excluded in the first part of the will. A bequest to a municipal corporation, to be applied by them for such purposes as they should judge to be most for the benefit and ornament of the

Gunning, 7 Sim. R. 644; *Briggs v. Penny*, 8 Eng. Law & Eq. R. 231; *Wood v. Cox*, 2 Mylne & Craig, 684. But where the objects of a trust are too indefinite to afford any certainty, there courts of equity will not execute it; but the property will fall into the residuum of the testator’s estate; as it is clear, that the legatee or devisee is not to take for his own use. *Stubbs v. Sargon*, 2 Keen, R. 255; *S. C.* 3 Mylne & Craig, 507; *Ommaney v. Butcher*, 1 Turn. & Russ. 260; *Ford v. Fowler*, 3 Beavan, R. 146, 147; *Ante*, § 979 a; *Post*, § 1071, 1183; 2 *Roper on Legacies*, by White, ch. 21, § 6, p. 373 to 389; *Lewin on Trusts*, ch. 5, § 2, p. 77 to 81; *Knight v. Knight*, 3 Beavan, R. 148, 172 to 174; *Knight v. Boughton*, 11 Clark & Finnel. 513, 548. [But a trust will not be created, if such a construction is inconsistent with any positive provision in the will. *Shaw v. Lawless*, 5 Clark & Finnel. R. 129; *Knott v. Cottee*, 2 Phillips, Ch. R. 192.]

¹ [* *Bernard v. Minshall*, Johnson, 276.

² 1 Simons, N. S. 358.

³ 3 McN. & G. 546.

town, is not void under the act of mortmain; for, where a discretion is given to apply a gift, either for a legal or illegal purpose, the presumption is, that the discretion will be exercised in favor of the object, which the law allows.¹ A bequest to one's wife, and declaring, that although he had given the whole of his property by his will to his wife, yet it was his desire, if his children conducted themselves to her approbation, she should leave such property equally amongst them all, was held to create a trust in favor of the surviving children.² But where the testator left all the residue of his property, real and personal, to his wife, with power to dispose of the same among all or any of his children, in her discretion, it was held to be an absolute gift to the wife.³

§ 1069. The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire, into positive and peremptory commands, is not a little difficult to be maintained, upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides, that, where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good-will and pleasure of the party enjoying his confidence and favor; and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot, and ought not to be held to create a trust. Now, words of recommendation, and other words precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and, therefore, ought to be so construed, unless a different sense is irresistibly forced upon them by the context.⁴ Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but, as far as the authorities will

¹ *Faversham v. Ryder*, 5 De G. M. & G. 350. See also, upon the general subject, *Gully v. Cregoe*, 24 Beavan, 185.

² *Bonser v. Kinnear*, 6 Jur. N. S. 882. See also *Liddard v. Liddard*, 6 Jur. N. S. 439.

³ *Howarth v. Dewell*, 6 Jur. N. S. 1360.]

⁴ See *Meredith v. Heneage*, 1 Sim. R. 542.

allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense.¹

§ 1070. Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite;² wherever the property to which it is to attach is not certain or definite; wherever a clear discretion and choice to act, or not to act, is given; wherever the prior dispositions of the property import absolute and uncontrollable ownership; in all such cases courts of equity will not create a trust from words of this character.³

¹ *Sale v. Moore*, 1 Sim. R. 534; *Meredith v. Heneage*, 1 Sim. R. 542. In *Sale v. Moore*, 1 Sim. R. 534, the Vice-Chancellor said: "The first case, that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions of late years has been against converting the legatee into a trustee." See also *Meredith v. Heneage*, 1 Sim. R. 542, where Lord Ch. Baron Richards expressed a similar opinion; and Lord Eldon, also, in *Wright v. Atkyns*, 1 V. & Beam. 315; *Lechmere v. Lavie*, 2 Mylne & Keen, 197; *Lawless v. Shaw*, 1 Lloyd & Goold, R. 154, and the reporter's note; *Benson v. Whittam*, 5 Sim. R. 22; *Podmore v. Gunning*, 7 Sim. R. 644; *Wood v. Cox*, 1 Keen, R. 317; S. C. on Appeal, 2 M. & Craig, 684. A strong case, illustrative of the doctrine now maintained, is *Ex parte Payne* (2 Younge & Coll. 646). There the testator devised his estate to his daughter, "as some reward for her affectionate, unwearied, and unexampled attention to him during his illness of many years"; and then added, "I strongly recommend to her to execute a settlement of the said estate, and thereby to vest the same in trustees, &c., for the use and benefit of herself for life, with remainder to her husband and his assigns for life, with remainder to all and every the children she may happen to have, if more than one, share and share alike; and if but one, the whole to such one; or to such other uses as my said daughter shall think proper; to the intent, that the said estate, in the event of her marriage, shall be effectually protected and secured"; and Lord Chief Baron Abinger held, that the daughter took an absolute estate. But see *Ford v. Fowler*, 3 Beavan, R. 146, 147, and *Knight v. Knight*, 3 Beavan, R. 148, 172, 173; *Ante*, § 1068. See *Mayor of Gloucester v. Wood*, 3 Hare, R. 131, 143.

² See *Ante*, § 979 a; *Stubbs v. Sargon*, 2 Keen, R. 255; S. C. 3 Mylne & Craig, 507; *Ommaney v. Butcher*, 1 Turn. & Russ. 260, 270, 271; *Mayor of Gloucester v. Wood*, 3 Hare, R. 131, 143. In this last case the court held, that a bequest to an individual or corporation, for a purpose which the testator says he has expressed elsewhere, but which, from some unexplained cause, is not and cannot be ascertained, creates such an uncertainty that a court of equity cannot declare what the intention of the testator is; and therefore it is to be deemed void.

³ *Wynne v. Hawkins*, 1 Bro. Ch. R. 179; *Harland v. Trigg*, 1 Bro. Ch. R. 143; *Meredith v. Heneage*, 1 Sim. R. 542; *Moggridge v. Thackwell*, 7 Ves. 82, 83; *Morice v. Bishop of Durham*, 10 Ves. 536; *Cary v. Cary*, 2 Sch. & Lefr. 189; *Tibbits v. Tibbits*, 19 Ves. 664; *Eade v. Eade*, 5 Madd. R. 118; *Curtis v. Rippon*,

In the nature of things, there is a wide distinction between a power and a trust. In the former, the party may, or may not

5 Madd. R. 434; 2 Madd. Ch. Pr. 6; 2 Fonbl. Eq. B. 2, ch. 2, § 4, note (x); Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 99 to 102. In *Wright v. Atkyns*, 1 Turn. & Russ. 157, Lord Eldon said, that, in order to determine whether a trust of this sort is a trust which a court of equity will interfere with, it is matter of observation: first, that the words should be imperative; secondly, that the subject must be certain; and, thirdly, that the object must be as certain as the subject. The case of *Wood v. Cox*, 2 Mylne & Craig, 684, affords a strong illustration of the first point. In *Pope v. Pope*, 10 Simons, R. 1, the testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will, and added: "And my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey, to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide"; and, at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children. It was held, that no trust was created for the children. This subject was much considered in the case of *Knight v. Knight*, 3 Beavan, R. 148, 172 to 175, where Lord Langdale said: "But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or enforced as a trust in this court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this court ought to deem fit to be, or capable of being, enforced as such. In the construction and execution of wills, it is undoubtedly the duty of this court to give effect to the intention of the testator, whenever it can be ascertained; but in cases of this nature, and in the examination of the authorities which are to be consulted in relation to them, it is, unfortunately, necessary to make some distinction between the intention of the testator and that which the court has deemed it to be its duty to perform; for of late years it has frequently been admitted, by judges of great eminence, that, by interfering in such cases, the court has sometimes rather made a will for the testator, than executed the testator's will according to his intention; and the observation shows the necessity of being extremely cautious in admitting any, the least, extension of the principle to be extracted from a long series of authorities, in respect of which such admissions have been made. As a general rule it has been laid down, that, when property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust: First, if the words are so used, that, upon the whole, they ought to be construed as imperative; Secondly, if the subject of the recommendation or wish be certain; and, Thirdly, if the objects or persons in-

act, in his discretion; in the latter, the trust will be executed, notwithstanding his omission to act.¹

tended to have the benefit of the recommendation or wish be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives £1,000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish. So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B., after his death, to give to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, although a subject to be ascertained, and that the relations to be selected, although persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable, so capable of being made certain, that the rule is applicable to such cases. On the other hand, if the giver accompanies his expression of wish, or request by other words, from which it is to be collected, that he did not intend the wish to be imperative; or, if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words 'free and unfettered,' accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule. And in such cases we are told (2 Ves. Jr. 632, 633), that the question 'never turns upon the grammatical import of words; they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered.' And (10 Ves. 536) 'wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in the will, not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court, to say what should be so applied; or to what objects, has been the foundation of the argument, that no trust was intended'; or, as Lord Eldon expresses it in another case (Turn. & Russ. 159), 'where a trust is to be raised, characterized by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say, it is not sufficiently clear what the testator intended.'" See also *Knight v. Boughton*, 11 Clark & Finnel. R. 548.

¹ *Brown v. Higgs*, 8 Ves. 569, 570, 574; *Pushman v. Filliter*, 3 Ves. 7; *Morice*

§ 1071. In respect to certainty in the description of objects or persons in such recommendatory trusts, it may be proper to state, that it is not indispensable that the persons should be described by their names. But more general descriptions will often amount to a sufficient designation of the persons to take; such, for example, as “sons,” “children,” “family,” and “relations”; if the context fixes the particular persons who are to take, clearly and definitely.¹ Thus, a devise to the family of A. will often be a sufficient designation, and may be construed to mean the heir at law of A., or the children of A., or even the relations of A., according to the context.² And, on the other hand, the language may be so loosely and indeterminately used, as not to amount to a clear designation of any persons; and thus the recommendation may fail to create a trust.

§ 1072. Thus, where a testator devised his leasehold estates to his brother A. forever, “hoping he will continue them in the family”; it was held that this raised no trust for the family; for no particular objects were pointed out. There was a choice; and the devisee might dispose of the property either way; and, if he had sold it, the family could not have claimed against the vendee.³ On the other hand, where a testator devised all his leasehold, as well as freehold estates, &c., “unto his mother and her heirs forever, in the fullest confidence that after her decease she would devise the property to his family”; it was held, that she took an estate for life, with a remainder in trust for the devisee’s heir at law, as *persona designata*.⁴

§ 1073. Certainty in the description of property bequeathed may be illustrated by some cases which have already passed into

v. Bishop of Durham, 10 Ves. 536; *Winch v. Brutton*, The (English) Jurist, 1844, vol. 8, p. 1086. This last case contains a very striking illustration of the doctrine.

¹ *Pierson v. Garnet*, 2 Bro. Ch. R. 38; *Forbes v. Ball*, 3 Meriv. R. 437; 1 Powell on Devises, by Jarman, 274, and note (7); *Id.* 290, note (3); *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 2, p. 100, 101.

² See *Wright v. Atkyns*, 17 Ves. 255; S. C. 19 Ves. 301; *Cooper*, Eq. R. 116; *Barnes v. Patch*, 8 Ves. 604; *Mayor of Hamilton v. Hoddson*, 11 Jurist. 193; *Cruwys v. Colman*, 9 Ves. 319; 1 Powell on Devises, by Jarman, 274, note (7); *Ante*, § 1065 *a*.

³ *Harland v. Trigg*, 1 Bro. Ch. R. 142, 144. See *Doe v. Joinville*, 3 East, R. 172; *Sale v. Moore*, 1 Sim. R. 534; *Nowlan v. Nellighan*, 1 Bro. Ch. R. 489; *Curtis v. Rippon*, 5 Madd. R. 434.

⁴ *Wright v. Atkyns*, 17 Ves. 255; S. C. 19 Ves. 301; *Cooper*, Eq. R. 116.

judgment. Thus, where a testator bequeathed to his wife all the residue of his personal estate, "not doubting, but that she will dispose of what shall be left at her death to our two grandchildren"; it was held that the uncertainty of the property, to which the bequest should attach (what shall be left), defeated it, as a recommendatory trust; for the residue might be just such as the wife chose.¹ So, where a testator bequeathed to his wife all the residue of his estate, "recommending to her, and not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself, in case I should survive her"; it was held, that the words did not create a trust, from the uncertainty both of the objects and the property to be taken by the relations.²

§ 1074. These may suffice as specimens of the curious refinements in the interpretation of wills, which courts of equity have adopted in creating constructive trusts; in which, indeed, they have often been followed by courts of law in regard to legal estates.³ It is highly probable, that some of these refinements were borrowed from the civil law, in which the distinction between pure legacies, and legacies clothed with trusts, was well known. Thus, it is said, *Legatum est, quod legis modo, id est imperativè, testamento relinquitur. Nam ea, quæ precativo modo relinquantur, fideicommissa vocantur.*⁴ And again, *Fideicommis-*

¹ Wynne v. Hawkins, 1 Bro. Ch. R. 179; Pushman v. Filliter, 3 Ves. 7; Eade v. Eade, 5 Madd. R. 118; Curtis v. Rippon, 5 Madd. R. 434. See also Harwood v. West, 1 Sim. & Stu. 387. In Gilbert v. Bennett (10 Simons, R. 471), the testator gave all his property to his wife and two other persons, in trust for the undermentioned purpose, namely, to pay the income to his wife, for the education and support of his children by her; and, after her death, the property to be divided among his children; and he gave his furniture, plate, &c. to his wife absolutely. It was held, that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income, for her life, she maintaining and educating the children out of it. But see Smith v. Bell, 6 Peters, 68; Post, § 1394.

² Sale v. Moore, 1 Sim. R. 534; Attorney-General v. Hall, cited 2 Cox, R. 355; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 100. See also Podmore v. Gunning, 7 Sim. R. 614; Wood v. Cox, 1 Keen, R. 317; S. C. on Appeal, 2 Mylne & Craig, R. 684; Ex parte Payne, 2 Younge & Coll. 636; Ante, § 979 a, 1068 to 1072, 1183.

³ Doe v. Smith, 5 M. & Selw. 126; Doe v. Joinville, 3 East, R. 172.

⁴ Pothier, Pand. Lib. 30, tit. 1 to 3, n. 3.

*sum est, quod non civilibus verbis, sed precativè relinquitur; nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis.*¹ And then, by the way of illustration, it is declared, *Fidei-committere his verbis possumus; rogo, peto, volo, mando, deprecor, cupio, injungo, desidero, quoque et impero, verba, utile faciunt fidei-commissum: relinquo, vero, et commendo, nullam, fideicommissi pariunt actionem.*² Some of these shades of distinction are extremely nice, and almost evanescent; especially that between the words *deprecor, peto*, and *desidero*, and the words *relinquo* and *commendo*. Again, *Etiam, hoc modo; cupio des, opto des, credo te daturum, fideicommissum est.*³ *Et eo modo relictum; exigo, desidero uti des, fideicommissum valet.*⁴ *Verba, quibus testator ita caverat; Non dubitare se, quodcumque uxor ejus cepisset liberis suis redditurum, pro fideicommisso accipienda.*⁵ In these last citations we may clearly trace the origin, or at least the application, of some of our modern equity doctrines.

§ 1074 *a*. It is in cases of wills that courts of equity are frequently called upon to apply the doctrine, as it is commonly called, of *cy pres*; and it is by no means confined, as is sometimes supposed, to cases of charities. The doctrine of *cy pres* “is now sufficiently simple, and is well established, though sometimes of difficult application. If an estate is given to a person for life, or indefinitely, and, after failure of issue of such person, it is given over, the court implies an estate tail in the first taker, sacrificing only, in that simple case, the life-estate, in order that all the issue may be embraced in the limitation. The next case which may be noticed, is where a testator, after giving a particular estate to the first taker, has gone on to direct that it shall go to unborn persons in a way which would create a perpetuity, with a limitation over on failure of issue of the first taker. The court, in such a case, is embarrassed with the fact, that, besides the gift over, which, in the simple case first stated, would create an estate tail, there is a direction that the estate shall devolve in a manner not allowed by law, but which, in common cases, pre-

¹ Ibid.

² Ibid.; Inst. B. 2, tit. 24, § 3; Cod. Lib. 6, tit. 43, l. 2; Dig. Lib. 31, tit. 2, l. 77 *passim*; 2 Domat, B. 4, tit 2, § 1, art. 3.

³ Dig. Lib. 30, tit. 1, l. 115; Pothier, Pand. Lib. 30, tit. 1 to 3, n. 26.

⁴ Dig. Lib. 30, tit. 1, l. 118; Pothier, Pand. Lib. 30, tit. 1 to 3, n. 26.

⁵ Dig. Lib. 31, tit. 2, l. 67, § 10; Pothier, Pand. Lib. 30, tit. 1 to 3, n. 26. See Knight v. Knight, 3 Beavan, R. 148, 161.

viously to *Pitt v. Jackson*,¹ would, so far as respected the order of the succession, only be consistent with and included in an intention to give an estate tail. The courts were thus placed in this position; the intention to give the estate to particular persons, in particular order of succession, was manifest; but the specified mode in which those persons were to take being excluded by the rule of law against perpetuities, the question was, whether the primary intention to benefit particular persons, in a particular order of succession, should be accomplished, and the particular mode of giving effect to it be rejected, or the whole will be inoperative. This was the difficulty with which the court had to struggle. "Whether the two expressed intentions, both of which could not be effectuated, were well or ill described by the terms 'general' and 'particular' intention, or whether the criticism upon those expressions is just, appears to me immaterial. It is a mode of characterizing the different, and, to a certain extent, conflicting intentions of the testator, which satisfied Lord Eldon and other judges of great eminence. The meaning of the terms is now sufficiently understood. In order to preserve and effect something which the court collects, from the will, to have been the paramount object of the testator, it rejects something else, which is regarded as merely a subordinate purpose, namely, the mode of carrying out that paramount intention."²

[* § 1074 b. The illustrations of the constructions which courts of equity have adopted, in the case of wills, in order to effect the obvious intention of the testator, by a departure, more or less marked, from the strict literal and grammatical import of the words, are, of necessity, almost as various as the cases. Some general rules will be found to obtain in all cases which are regarded as reliable. 1. That the words must have their ordinary, popular signification, technical terms excepted, unless there is something in the context, or subject-matter, to indicate a different use; and this indication must be clear and unequivocal, in order to prevail. 2. Where the words can have a natural, and also a secondary and unusual interpretation, the former will be preferred.³

¹ 2 Bro. C. C. 51.

² Mr. Vice-Chancellor Wigram, in *Vanderplank v. King*, 3 Hare, R. 112; *Pitt v. Jackson*, 2 Bro. Ch. R. 51; *Post*, § 1169. [* See *Hannam v. Sims*, 2 De Gex & Jones, 149.

³ The following cases will illustrate the general subject. *Pasmore v. Huggins*, 21 Beavan, 103; *Abbott v. Middleton*, 21 Beavan, 143; *Hilderson v. Globe*,

Words will be supplied by obvious implication.¹ "Or" will be read "and."² Where a residue is given directly to a class, and it consists partly of reversionary property, the class is to be ascertained at once, and not from time to time, as the reversions fall in and become distributable.³ And in construing a will, plain and distinct words are only to be controlled by words equally plain and distinct.⁴ The general presumption is, that the testator expects the words of his will to speak from his death. A different construction will not therefore be admitted unless very obviously intended.⁵ If the language of a will admit of two constructions, — one, reasonable and natural in its direction of property, and the other capricious and inconvenient, courts of justice may reasonably lean towards the former, as being what was probably intended.⁶

§ 1074 *c*. A marked change has occurred in the construction of wills, in regard to clauses connected conjunctively being construed disjunctively, and *vice versa*. From the time of Lord Hardwicke⁷ until a comparatively recent date,⁸ the construction of taking such clauses rather according to the general purpose and scope of the instrument had prevailed, whereby a conjunctive particle was often read disjunctively, and sometimes the contrary. But Lord Ellenborough⁹ thought it contrary to common sense to read "and" disjunctively. Since that time the decisions have fluctuated, until the case of *Grey v. Pearson*, before the House of Lords, where it was definitely settled that the strict literal construction should prevail.¹⁰

Id. 518; *Circuit v. Perry*, 23 Beavan, 275; *Birds v. Askey*, 24 Beavan, 615; *Douglas v. Fellows*, Kay, 114; *Kennedy v. Sedgwick*, 3 Kay & J. 540; *Browne v. Hammond*, Johnson, 210, and cases there cited.

¹ *Abbott v. Middleton*, *supra*.

² *Maude v. Maude*, 22 Beavan, 290.

³ *Hagger v. Payne*, 23 Beavan, 474; *Ante*, § 604 *a*.

⁴ *Goodwin v. Finlayson*, 25 Beavan, 65.

⁵ *Goodlad v. Burnett*, 1 Kay & Johns. 341; *Bullock v. Bennett*, 1 Kay & J. 315.

⁶ *Jenkins v. Hughes*, 6 Jur. N. S. 1043. The testimony of the person who drew a will can never be received, as to the intent of the testator, except in the case of a latent ambiguity. *Coffin v. Elliott*, 9 Rich. Eq. R. 244.

⁷ *Brownsword v. Edwards*, 2 Ves. Sen. 248; *Bell v. Phyn*, 7 Ves. 453.

⁸ *Doe v. Jessep*, 12 East, 288.

⁹ *Ibid.*

¹⁰ 6 House Lords Cas. 61; S. C. 3 Jur. N. S. 823. See, also, *Pearson v. Rutter*, 3 De G. M. & G. 398; *Seccombe v. Edwards*, 6 Jur. N. S. 642.

§ 1074 d. It seems to be admitted, that, as a general rule, the term "money," in a will, does not include stocks, either in the public funds or private corporations. But where there is nothing else upon which the gift can operate, it was held that public stocks will pass under a bequest of "all the money I may die possessed of."¹ But a bequest of "all my fortune now standing in the funds," will not pass bank-stock.² But in many cases, and particularly in cases of executory devises, the gift over is held to take effect where the contemplated intervening estate never attaches, as where the gift over is upon the death of settlor's children, leaving no issue, and the settlor in fact never has any children.³

§ 1074 e. Where the testator provided portions for his wife and also for his two daughters, to be decided when the youngest child should arrive at the age of twenty-one; and by a codicil directed that if both his daughters should die in their minority, without issue, the property should all go to his wife; and the eldest daughter became twenty-one, but died without issue, and the youngest daughter died before she became twenty-one, without issue; it was held that the gift over had failed, the precise state of facts upon which it was to take effect not having occurred. The court say, "It cannot be conjectured what the testator would have done if the state of things that had happened had been present to his mind. The words that he has used must be adhered to; and the testator must be taken to have used the word 'minority' in its ordinary sense."⁴

§ 1074 f. The Lord Chancellor, in discussing the question of construction of wills in a late case,⁵ said, "Upon the construction of wills we are not much assisted by a reference to cases, unless the will, or the words used, are very similar. If this is not so, they are more likely to mislead than to assist, in coming to a correct conclusion. The object of construction is to ascertain the intention of the testator, which is to be collected, not from isolated passages, but from the whole of the will, and the general scope

¹ *Chapman v. Reynolds*, 6 Jur. N. S. 440. See, also, *Cowling v. Cowling*, 26 Beavan, 449; *Lowe v. Thomas*, 5 De G. M. & G. 315; *Wylie v. Wylie*, 6 Jur. N. S. 259.

² *Slingsby v. Grainger*, 5 Jur. N. S. 1111; *In re Powell*, 5 Jur. N. S. 331.

³ *Osborn v. Bellman*, 6 Jur. N. S. 1325.

⁴ *Maddison v. Chapman*, 5 Jur. N. S. 277; *Bootle v. Scarisbrick*, 1 H. L. C. 188.

⁵ *Stewart v. Jones*, 5 Jur. N. S. 229; S. C. 3 De G. & J. 532.

and scheme of it. And first, what is the ordinary meaning of the expressions used by the testator? If the meaning of the words he has used is clear, they must be adopted, whatever the inclination of the court may be."

§ 1074 *g*. The disposition of the courts of equity undoubtedly is, to construe general words in a will, following a specific enumeration of articles, as limited to matters *ejusdem generis*. It was accordingly held, that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other goods, chattels, and effects, which shall be in, upon, and about my dwelling-house and premises, at the time of my decease," did not include a sum of money found in the house.¹]

CHAPTER XXX.

ELECTION AND SATISFACTION.

[* § 1075. Election arises where there is a plurality of rights not concurrent.

§ 1076. Election is either express or implied.

§ 1077. It is based upon the duty of accepting the burden with the gift.

§ 1078, 1079. Rules of the civil law upon the subject.

§ 1080. Election exists in regard to different instruments.

§ 1080 *a*. Persons under disability may make an election.

§ 1080 *b*. Married women cannot reach property, by election, which was put beyond anticipation.

§ 1081. Party only put to an election in courts of equity.

§ 1082. Equity proceeds to compel elections differently from courts of law.

§ 1083. One electing against an instrument, treated as trustee.

§ 1084. The rule stated by Sir William Grant.

§ 1085. Election against an instrument only forfeits, in equity, so much as will compensate; at law, it forfeits all.

§ 1086. Election only exists where the donor intends to give what is not his own.

§ 1087. Giving property subject to charge creates no election.

§ 1087 *a*. Only extends to direct claims, clearly defined.

§ 1087 *b*. Illustrations of general subject.

§ 1088. Wife not compellable to elect, as to dower, unless such intent very clearly fined.

§ 1088 *a*. This proposition illustrated by the cases.

§ 1089. Election not created where testator has any interest.

§ 1090. This doctrine not extended by construction.

¹ Gibbs *v.* Lawrence, 7 Jur. N. S. 137. The cases upon this point are extensively reviewed here.]

- § 1091. Party only forfeits what is clearly defined.
- § 1092. Election does not extend to creditors.
- § 1093. Not important whether party knew the property was not his own.
- § 1094. Election produced by after-purchased estate.
- § 1095, 1096. Rule not affected by kind or quantity of interest.
- § 1097. What amounts to an election. Act and intent.
- § 1098. Party not bound to elect in ignorance.
- § 1099. Satisfaction is done in lieu of performance.
- § 1100. Equity regards a donation as satisfaction of debt.
- § 1101. Not applied to creditor so much as to children.
- § 1102. The presumption of satisfaction may be rebutted.
- § 1103. The gift and debt must be of the same species.
- § 1104, 1105. If that be so, it will extinguish the debt, or *pro tanto*.
- § 1106-1108. Distinction between performance and satisfaction.
- § 1109. Rule as to satisfaction of marriage portions.
- § 1110. Legacy generally regarded as satisfaction.
- § 1111. Portion advanced will adeem a legacy.
- § 1112. Grounds of presumption stated.
- § 1113. Reason of the rule questioned.
- § 1114. Doctrine of civil law stated.
- § 1115, 1115 *a*. Whether a residuary bequest is adeemed, matter of intention.
- § 1116. Rule applies only to parent and child, or those in similar relation.
- § 1117. Legacy to stranger not ordinarily adeemed.
- § 1118. Reason for distinction unsatisfactory.
- § 1119. Legacy to creditor, payment of debt.
- § 1120. Reason for such presumption unsatisfactory.
- § 1121. Civil law required legacy to be same as debt.
- § 1122. Slight circumstances exclude the rule as to debts.
- § 1123. Legacy to debtor does not release debt.
- § 1123 *a*. Cumulative legacies.
- § 1123 *b*. Construction of an English will as satisfaction for the provisions of a Scottish settlement.]

§ 1075. It is in cases of wills also, that the doctrine respecting ELECTION AND SATISFACTION must frequently, though not exclusively,¹ arise in practice, and is acted upon and enforced by courts of equity.² Election, in the sense here used, is the obligation im-

¹ There is no question, that the doctrine of election extends to deeds in the English law. See the cases cited in Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 400, 401. Mr. Swanston seems to think, that the doctrine of election in the civil law was confined to wills; and originated in the like application to wills in English jurisprudence. Perhaps it is questionable, whether, in the civil law, the doctrine was confined to wills. These were the most common instruments under which it would arise; and that may account for most of the cases being put as arising on wills. But the principle, in its own nature, seems equally applicable to other instruments.

² *Birmingham v. Kirwan*, 2 Sch. & Lefr. 449; 2 Madd. Ch. Pr. 40 to 69; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 5, p. 534 to 537; 1 *Roberts on Wills*, ch. 1, § 10, p. 96 to 106; 2 *Roper on Legacies*, by White, ch. 23, p. 480 to 579. [* The

posed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party, who has a right to control one or both, that one should be a substitute for the other. The party, who is to take, has a choice; but he cannot enjoy the benefits of both.¹

§ 1076. Thus, for example, if a testator should, by his will, give to a legatee an absolute legacy of ten thousand dollars, or an annuity of one thousand dollars per annum during his life, at his election; it would be clear that he ought not to have both; and that he ought to be compelled to make an election, whether he would take the one or the other. This would be a case of express and positive election. But suppose, instead of such a bequest, a testator should devise an estate belonging to his son, or heir at law, to a third person; and should, in the same will, bequeath to his son, or heir at law, a legacy of one hundred thousand dollars, or should make him the residuary devisee of all his estate, real and personal. It would be manifest, that the testator intended that the son or heir should not take both to the exclusion of the other devisee; and therefore he ought to be put to his election, which he would take; that is, either to relinquish his own estate or the bequest under the will. This would be a case of implied or constructive election.²

§ 1077. Now, the ground upon which courts of equity inter-devise of an estate does not *per se* import an intention to devise it free from incumbrance, so as to put incumbrancers to their election. *Stephens v. Stephens*, 1 De Gex & J. 62. Such a devise, upon condition that the devisee should confirm such other devises in testator's will as had reference to the property of S. U. requires that the devisee should elect whether he will hold from S. U. or under the will. *Usticke v. Peters*, 4 Kay & Johnson, 437. See, also, *Wintour v. Clifton*, 21 Beavan, 447.]

¹ Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. R. 394, note (b); 3 Wooddes. Lect. 69, p. 491; *Thellusson v. Woodford*, 13 Ves. 220; 2 Madd. Ch. Pr. 40 to 49; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 5, p. 534 to 538. Mr. Swanston's note is drawn up with great ability and learning; and I have freely used it in the discussion of this topic. The whole subject of election is also most elaborately examined in *Roper on Legacies* by White, vol. 2, ch. 23, p. 480 to 578, to which the attention of the learned reader is invited. It is wholly inconsistent with the nature of these Commentaries to discuss all the minute distinctions belonging to it, interesting and important as they certainly are.

² *Ibid.*

fere in all cases of this sort (for at law there is no direct remedy to compel an election) is, that the purposes of substantial justice may be obtained by carrying into full effect the whole intentions of the testator.¹ And in regard to the cases of implied election, it has been truly remarked, that the foundation of the doctrine is still the intention of the author of the instrument; an intention, which, extending to the whole disposition, is frustrated by the failure of any part. Its characteristic, in its application to these cases, is, that, by equitable arrangement, full effect is given to a donation of that which is not the property of the donor. A valid gift, in terms absolute, is qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition, (although it is destitute of legal validity,) not express, but implied, which is annexed to the benefit proposed to him. For the donee to accept the benefit, while he declines the burden, is to defraud the design of the donor.² In short, courts of equity, in such cases, adopt the rational exposition of the will, that there is an implied condition that he, who accepts a benefit under the instrument, shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it.³

¹ *Crosbie v. Murray*, 1 Ves. Jr. 557, 559.

² 1 *Swanston*, R. 394, 395, note (b), where the authorities are fully collected; *Noys v. Mordaunt*, 2 Vern. 581, and Mr. Raithby's note; S. C. *Gilb. Eq. R.* 2; 2 *Fonbl. Eq. B.* 4, ch. 1, § 5, note (l). [* There is no rule that a person to whom the testator has made two distinct gifts, one of which is subject to a burden, created by the testator, is bound to accept both or neither of these gifts. The question is one of intention to be gathered from the will. *Warren v. Rudall*, and *Hall v. Warren*, 6 Jur. N. S. 395.]

³ 1 *Powell on Devises*, by Jarman, 430, 433, note (4); 1 *Swanst. R.* 393 to 408, note (b); *Frank v. Lady Standish*, 15 Ves. 391, note; *Streatfield v. Streatfield*, *Cas. T. Talb.* 183; *Boughton v. Boughton*, 2 Ves. 12, 14; *Boome v. Monck*, 10 Ves. 616, 617; *Walker v. Jackson*, 2 Atk. 627, 629; *Clarke v. Guise*, 2 Ves. 617; *Wilson v. Lord Townshend*, 2 Ves. Jr. 696; *Blake v. Banbury*, 4 Bro. Ch. R. 21, 24; S. C. 1 Ves. Jr. 514; *Thellusson v. Woodford*, 13 Ves. 220; 2 *Madd. Ch. Pr.* 40 to 49. Lord Redesdale's remarks on this subject, in *Birmingham v. Kirwan* (2 Sch. & Lefr. 449, 450), illustrates the principle very clearly. "The general rule," says he, "is, that a person cannot accept and reject the same instrument. And this is the foundation of the law of election, on which courts of equity, particularly, have grounded a variety of decisions, in cases both of deeds and of wills; though principally in cases of wills; because deeds, being generally matter of contract, the contract is not to be interpreted otherwise than as the consider-

§ 1078. The doctrine of election, like many other doctrines of equity jurisprudence, appears to have been derived from the civil law. By that law, a bequest of property, which the testator knew to belong to another, was not void; but it entitled the legatee to recover from his heir either the subject of the bequest, or, if the owner was unwilling to part with that at a reasonable price, the pecuniary value.¹ Thus, it is said in the Institutes, that a testator may not only bequeath his own property, or that of his heir, but also the property of other persons; so that the heir may be obliged to purchase and deliver it; or, if he cannot purchase it, to give the legatee its value.² But ordinarily, to give effect to a legacy in such a case, the testator must have known that the property so bequeathed by him belonged to another; and not have been ignorant of the fact, and supposed the property was his own. *Hæredum etiam res proprias* (says the Code), *per fideicommissum relinqui posse, non ambigitur*.³

§ 1079. In the civil law, also, wherever the heir or devisee took an estate under a will, containing burdensome legacies, or any disposition of his own property in the manner above mentioned, he was at liberty to accept or to renounce the inheritance. But (it has been said) he had no other alternative. He could not accept the benefit offered by the will, and retain the property, of which it assumed to dispose, upon the terms of compensation or indemnity to the disappointed claimant. The effect, therefore, of an election to take in opposition to the will, was a renunciation of all the benefits offered by it. The effect of an election to take under the will was different, according to the subject-matter. If the property, of which the will assumed to deprive the devisee, was real estate, and the will was a will of real estate, the election, which is expressed, requires; and voluntary deeds are generally prepared with greater deliberation, and more knowledge of pre-existing circumstances, than wills, which are often prepared with less care, and by persons uninformed of circumstances, and sometimes ignorant of the effect even of the language which they use. In wills, therefore, it is frequently necessary to consider the general purport of the disposition, in order to extract from it what is the intention of the testator. The rule of election, however, I take to be applicable to every species of instrument, whether deed or will, and to be a rule of law as well as of equity."

¹ 2 Domat, B. 4, tit. 2, § 3, art. 3 to 5.

² Inst. B. 2, tit. 20, § 4, tit. 24, § 2; Dig. Lib. 30, tit. 1, l. 39, § 7; Dig. Lib. 31, tit. 2, l. 67, § 8; 2 Domat, B. 4, tit. 2, § 2, art. 4; 1 Swanst. 396, note; Pothier Pand. Lib. 30, tit. 1, n. 125.

³ Cod. Lib. 6, tit. 42, l. 25.

was pecuniary, he was compelled to perform the bequest to the extent of the principal and interest, which he had received; if the property was specific, then a peremptory obligation was imposed upon him to deliver that very thing, although exceeding the amount of the benefit conferred on him.¹

§ 1080. The earliest cases, in which the doctrine of election was applied in English jurisprudence, seem to have been those arising out of wills; although it has since been extended to cases arising under other instruments.² It has been said, that the doctrine constitutes a rule of law, as well as of equity; and that the reason why courts of equity are more frequently called upon to consider the subject is, that in consequence of the forms of proceeding at law, the party cannot be put to elect. In order to enable a court of law to enforce the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded, by what he has done; that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not to leave it uncertain under what title he may take.³ Whether any such rule of election is recognized at law has been greatly doubted; although, in cases working by way of estoppel, there may be a rule sometimes approaching nearly to it.⁴

¹ Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. R. 396.

² Mr. Swanston's note, 1 Swanst. R. 397, 400, 401; *Bigland v. Huddleston*, 3 Brown, Ch. Cas. 285, note, Belt's edition, and his note (3); *Green v. Green*, 9 Meriv. R. 86; S. C. 19 Ves. 665. See *McElfert v. Schley*, 2 Gill, 182; *Preston v. Jones*, 9 Barr. 456; *Tiernan v. Roland*, 3 Harris, 430. It appears, from Mr. Swanston's note to *Dillon v. Parker* (1 Swanst. R. 397; Id. 443, 444), that traces of the interposition of courts of equity can be found as early as the reign of Queen Elizabeth. The suggestion of Lord Hardwicke, in *Boughton v. Boughton* (2 Ves. 14), that *Noys v. Mordaunt* (2 Vern. R. 581; S. C. Gilb. Eq. R. 2) was the first case, is undoubtedly incorrect; though Sir Thomas Clarke appears to have held the same opinion in *Clarke v. Guise* (2 Ves. R. 618). See Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. R. 399, and *Radcliffe v. Parkins* (6 Dow, R. 149).

³ Lord Redesdale, in 2 Sch. & Lefr. 450.

⁴ Mr. Swanston, in his learned note to *Gretton v. Haward*, 1 Swanst. 425, note (a), has commented on this subject at large. It is so valuable a review of the whole subject, that I have ventured to present it in this place. After citing the passage in the text, from Lord Redesdale's decision, he says: "Lord Rosslyn also is reported to have said, 'The principle of these cases (cases of election) is very clear. The application is more frequent here; but it is recognized in courts of

[* § 1080 *a*. In a late case¹ the question of the competency of persons under disabilities, to make valid elections affecting their

law every day. You cannot act, you cannot come forth to a court of justice, claiming in repugnant rights.' 2 Ves. Jr. 696. Lord Mansfield, in a judgment, the authority of which, on every point, has been strongly questioned (Sugden on Powers, 498 *et seq.*), professed the same opinion. 4 T. R. 743 n. See Goodtitle *v.* Bailey, Cowp. 597. That no court will enforce rights, which it recognizes as repugnant, may be admitted, probably, for an universal proposition. But courts which differ in the rights that they recognize, necessarily differ in the recognition of repugnancy. In no instance, it is believed (with the exception of the anomalous cases last cited), has a court of law adverted to a clause, by which a testator assumes to dispose of the property of his devisee in favor of a third person, for the purpose of declaring the right of the devisee to the benefit offered by the will, repugnant to his right to retain the property, of which that clause purports to dispose. It is obvious that such a clause, proceeding from one who is not the owner, cannot transfer the legal interest in the property. Being distinct and unconnected, without words or necessary implication of reference, it cannot qualify the prior clause of devise as a condition. Nor can it operate by estoppel against the devisee, no party to the will, and whose title to his own estate is not derived from the testator. Failing, therefore, to effect, it serves only to denote the purpose of its authority; and becomes the peculiar subject of the jurisdiction of a court of equity, which, in administering the rights of its suitors, by enforcing the obligations affecting their conscience, executes the intention in which those obligations originate. The instances in which courts of law have applied the maxim, *Allegans contraria non est audiendus*, are instances of inconsistent titles, whether to the same subject, as a contemporaneous estate for life, and in tail, in the same land (see Jenkins, Cent. 1, Case 27); or the claim of a tenant under and against his landlord (mentioned by Lord Rosslyn, 2 Ves. Jr. 696); or to different subjects, as dower at once in the land taken, and in the land given in exchange (see the case cited 3 Leon. 271, Perk. § 319); the assertion of one title being incomplete without a negation of the other. It is a maxim, not of morality, but of logic, and compels election between claims, in respect, not of the injustice, but of the technical impracticability of their contemporaneous assertion. In courts of law, the suitor is permitted to assert rights which, so far as the intention of the parties constitutes repugnancy, are confessedly repugnant. If a man can make a feoffment in fee of lands or tenements, either before or after marriage, to the use of the husband for life, and after, to the use of A. for life, and then to the use of the wife for life, in satisfaction of her dower; this is no jointure, within the statute, &c.; and albeit in that case A. should die, leaving the husband, and after the death of the husband, the wife entereth, yet this is no bar of her dower, but she shall have her dower also. (Co. Litt. 36 *b*, and see 4 C. 2 *b*, Wilmot's Opinions, p. 188; 9 Mod. 152.) So, if A. disseises B., tenant for life, or in fee, of the manor of Dale, and afterwards gives the manor of Dale to B. and his heirs, in full satisfaction of all his rights and actions, which he has in or for the manor of Dale, which B. accepts; yet B. may enter into the manor of Dale, or recover it in any real action. 4 Co.

¹ [* Barrow *v.* Barrow, 4 Kay & J. 409.]

title to real estate, is discussed very much at length and the cases revised, by an eminent equity judge, Sir William Page Wood.

1 *b.* No legal principle is better established than that on which these decisions proceed, namely, that a freehold right shall not be barred by collateral satisfaction. (Co. Litt. 3 *b*, Doct. Plac. 17.) The like assertion of rights, morally repugnant, has been sanctioned in many of the cases in which the courts have overruled a plea of accord and satisfaction (see Peyton's case, 9 Co. 77; Grymes v. Blofield, Cro. El. 541; Co. Litt. 212); the plaintiff being permitted, on technical grounds, to enforce a claim for which he had received a compensation. A devise or bequest of that which is not the property of the testator, is void at law. (Bransby v. Grantham, Plowd. 525, 526; Litt. § 287; Co. Litt. 185 *b*; Perk. § 526; Godolph. Orph. Leg. Pt. 3, ch. 6, § 5; Swinb. on Wills, Pt. 3, § 3, n. 8, § 5, prope fin. § 6, n. 17; Doct. & Stu. l. 2, ch. 25, p. 126.) 'If a man bequeath to one another man's horse, in the law of the realm the legacy is void to all intents, and he to whom the legacy is made shall neither have the horse nor the value of the horse.' (Id. l. 2, ch. 55, p. 300; and see 3 Co. 29 *a.*) To suppose that more favor would be shown to a clause in a deed, purporting to pass the property of a stranger, would be to contradict the established principle of construction. Being void, thereof, to all intents, such clause, whether in a deed or in a will, is inoperative at law, either for transferring the subject, or for qualifying a previous valid gift. To convert it into a condition, according to the equitable practice, by incorporation with a distinct clause, to which in terms it contains no reference, would be inconsistent with the rule, that conditions imposed by the particular intention of the individual (as distinguished from conditions founded in the nature of the relation or contract between the parties, and by us denominated conditions in law) must, conformably to the feudal principle (Craig, Jus. Feud. 1, 2, dieg. 5, § 4), be expressed. Co. Litt. 201 *a.* Many decisions may be found on the question, what words, annexed to the clause of gift for the purpose of connecting it with a distinct clause, constitute a condition. *Ex intentione ad affectum*, which are sufficient in a will (Co. Litt. 236 *b*), are not sufficient in a deed (Co. Litt. 204 *a*). But in no case, it is believed, has a court at law inferred a condition from words applicable only to another subject, and void in their obvious sense, as purporting to pass an estate not the property of the author of the clause. The general principle of the law on the subject of repugnant rights is illustrated by the decisions on the concurrent claims to jointure and to dower. The Statute of Uses (27th Hen. VIII. ch. 10) having transferred the legal estate to the *cestui que use*, all women, then married, would have become dowable of lands held to the use of their husbands, retaining their title to lands settled on them in jointure. To prevent this injustice, it is, by that statute (§ 6), declared, that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower. And a subsequent clause (§ 9) reserves to the wife a right to refuse a jointure assured during marriage. (See Wilmot's Opinions, p. 184 *et seq.*) It has been decided, that the species of estates enumerated are proposed only as examples; and the courts have in construction extended the operation of the statute to other instances within its principle, though not within its words. Vernon's case, 4 Co. 1. By the effect of this statute, therefore, no widow can claim both jointure and dower; jointure before marriage is a peremptory bar

The conclusion to which this eminent judge came is, that a married woman can elect so as to affect her interest in real estate, of dower; jointure after marriage, she has an option to renounce. Lord Redesdale, in support of the proposition, that election is a principle of law (2 Sch. & Lefr. 451), has referred to 3 Leonard, 273. That report (which is cited in 1 Eq. Cas. Abr. *Dower*, B) contains only the argument of Egerton, Solicitor-General. But the case (*Butler v. Baker*) is fully reported in 3 Co. 25; Poph. 87; 1 And. 348; and the decision proceeded on the construction of the statute. The passage to which Lord Redesdale refers (3 Leon. 272 and 273) is no more than a dictum of Egerton, in his argument. It is true, however, that the demandant, in a writ of dower, might be barred by plea of entry and acceptance of lands settled in jointure after marriage (*Doctrina, Plac.* p. 149). See the form of pleading, Co. Entr. 172 *a*. But it is also true, that the plea is founded on the act of Hen. VIII. The act having declared jointure a bar to dower, but reserved to the widow the option of refusing a jointure made after marriage, the question in that case was, 'Whether the widow had accepted or refused the jointure?' If she had not refused, under the 9th, she was barred of dower by the 6th section. The acceptance of the jointure constituting the case there specified, the widow was barred, not by her agreement, but by the statute (*Dyer*, 317 *a*). And it is abundantly clear, that acceptance alone, without the operation of the statute, would not have formed a bar. *Vernon's case*, 4 Co. 1; *Duchess of Somerset's case*, *Dyer*, 97 *b*. In *Gosling v. Warburton* (*Cro. El.* 128, reported under various names, 1 Leon. 136, *Owen*, 154), also cited by Lord Redesdale, and also referred to in *Eq. Cas. Ab. ubi supra*, a rent-charge was devised expressly 'in recompense of dower.' And the decision establishes only, that such a benefit so devised is a jointure within the extended construction of the statute, and cannot be claimed after a recovery of dower. The series of decisions under this statute (the only instances in which the doctrine of election has been applied at law, in a manner analogous to its application in equity), being founded expressly on the provisions of the statute, in contrast to the rules of the common law, constitute (it is conceived) a conclusive proof that the doctrine of election is equitable only. And one of the earliest instances (*Lacy v. Anderson*, *ante*) in which the equitable doctrine was enforced, is the case of a copyhold estate devised and accepted, in satisfaction of dower, which, not being either within the strict or the extended import of the statute, a jointure would not have constituted a bar at law. And the aid of equity was requisite, to prevent the disappointment of the testator's express intention. Accordingly, many authorities occur, in which the doctrine of election is described as exclusively equitable. In the report of *Noys v. Mordaunt*, by Chief Baron Gilbert, it is distinctly stated, that, 'although the three daughters shall at law take their proportion of the entailed lands, as co-heirs in tail, yet the eldest daughter in equity shall have an equivalent out of the fee-simple lands. (*Rep. in Eq.* 3.) Lord Hardwicke repeatedly refers to that case, which he considered the first of the kind as founded on equity (1 Ves. 306; 3 Bro. P. C. edit. Toml. 178, 179), a benevolent equity (3 Atk. 715); and describes the right to compel election, as derived from an equity of the Court of Chancery (2 Atk. 629). That description is, in substance, adopted by Lord Eldon (6 Dow, R. 179). Lord Chief Justice De Grey has accurately distinguished between the mode of indirectly disposing

without deed, acknowledged according to the requisite formalities of the statute; and that where she has, in fact, made such election, upon which other parties have acted, the court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of benefits arising from a fraud. In discussing this subject, the learned judge relied upon *Savage v. Foster*¹ and *Gretton v. Haward*,² as fully recognizing the rule upon which he acted; and he maintained, that the views of Lord Eldon, in *Jackson v. Hobhouse*,³ when properly considered, could not fairly be regarded as impugning the doctrine for which he contended. The proposition here maintained, in its application to the cases of married women and infants, and all others laboring under temporary disabilities, rendering them the objects of judicial protection, is so just and reasonable, that we should be surprised if, with proper limitations and exceptions, it did not ultimately prevail. The cases of *Lassence v. Tierney*,⁴ and *Field v. Moore*,⁵ are there explained and made consistent with the decision of the learned Vice-Chancellor.

§ 1080 b. It seems courts of equity will not aid a married woman in giving up property settled upon her, with restraint upon anticipation, although she would thereby become entitled to property of much greater value.⁶ But where she has settled at the same time, but by different instruments, some property which is settled with restraint upon anticipation and some without that restraint, and subsequently violates the rights of those entitled in remainder, by converting the entire interest in a portion to her own use, the court will apply the property settled to her separate use, without such restraint, to make an indemnity to those entitled in remainder. It was held that she could not in any way so

of the property of a stranger by express condition at law, or by implied condition in equity (3 Ves. 530). And Lord Commissioner Eyrie describes the practice of putting devisees to election, as a strong operation of a court of equity (4 Bro. C. C. 24; 1 Ves. Jr. 523)."

¹ [* 9 Mod. R. 35.

² 1 Swanst. R. 413.

³ 2 Merivale, R. 483.

⁴ 1 McN. & Gor. 551.

⁵ 19 Beavan, 176.

⁶ *Robinson v. Wheelwright*, 6 De G. M. & G. 535. See, also, *Jackson v. Hobhouse*, 2 Meriv. 483.

conduct as to affect the fund which had thus been put beyond her reach, by the restraint upon anticipation.¹]

§ 1081. But, whatever may be the truth of the case as to the recognition of the doctrine of election in courts of law, it is very certain that it is principally enforced in courts of equity, where, indeed, the jurisdiction to compel the party to make an election is admitted to be exclusive. But, independent of this broad and general ground of jurisdiction, the doctrine must be exclusively enforced in equity, in all cases of mere trust estates; or, where there is the intervention of complicated cross equities between different persons, claiming in different degrees, and under different limitations and titles; or where conveyances are necessary to be decreed; or where the recompense is not of a nature, capable of being applied as a bar at law. Thus (to put a plain case), at the common law no collateral recompense, made in satisfaction of dower, or of a right of freehold, could be pleaded in bar of such right of freehold or of dower.² But, in equity, it would be clearly held obligatory; and the party would be perpetually enjoined against asserting the title at law, or put to an election, as the circumstances of the case might require.³

§ 1082. In the actual application of the doctrine of election, courts of equity proceed upon principles, which are wholly incapable of being enforced in the like manner by courts of law. Thus, for example, suppose a case of election under a will, which disposes of other property of a devisee; and the devisee should elect to hold his own property, and renounce the benefit of the devise under the will, or (as the compendious phrase is) should elect against the will; in such a case, it is clear, that the party disappointed of his bequest or devise by such an election, would, at law, be wholly remediless. The election would terminate all the interest of the parties respectively in the subject-matter of the devise to them. The election to hold his own estate would, of course, maintain the original title of the devisee; and his renunciation of the intended benefit in the estate devised to him would leave the same to fall into the residuum of the testator's estate, as property undisposed of.

¹ *Clive v. Carew*, 5 Jur. N. S. 487.]

² Co. Litt. 36 b; 1 Swanst. R. 426, 427, note; *Ante*, § 1080, note (2).

³ *Ibid.*; *Lawrence v. Lawrence*, 2 Vern. 366, and Mr. Raithby's note (1); 1 Swanst. R. 398, note.

§ 1083. But the subject is contemplated in a very different light by courts of equity; for, in the event of such an election to take against the instrument, courts of equity will treat the substituted devise, not as an extinguished title, but as a trust in the devisee for the benefit of the disappointed claimants, to the amount of their interest therein; or, as it has been well expressed, they will assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints.¹

§ 1084. The reasoning, by which this doctrine is sustained, is thus stated by Sir William Grant: “If the will is in other respects so framed as to create a case of election, then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will; but, in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit, correspondent to that which they are deprived of by such non-compliance. So that the devise is read, as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees, as to so much of the estate given to him as shall be equal in value to the estate intended for them.”²

§ 1085. Another point has arisen in equity (and which could arise only in equity), and that is, whether a devisee, electing against the will, thereby forfeits the whole of the benefit proposed for him, or so much only as is requisite to compensate, by an equivalent, those claimants whom he has disappointed; so that he may entitle himself to the surplus. In other words, does such an election induce an absolute forfeiture, or only impose an obligation on the renouncing party to indemnify the claimants whom he disappoints? There is to be found in the authorities much contrariety of opinion, incidentally expressed, upon this point. But the fair result of the modern leading decisions is, that in such a case there is not an absolute forfeiture; but there is a duty of compensation (at least where the case admits of compensation), or its equivalent;³ and that the surplus, after such compensation, does not

¹ *Gretton v. Haward*, 1 Swanston, 441, note; *Green v. Green*, 2 Meriv. R. 86; S. C. 19 Ves. 665; *Pulteney v. Lord Darlington*, cited in *Green v. Green*, 2 Meriv. 93, 94, and in *Cavan v. Pulteney*, 2 Ves. Jr. 560.

² *Welby v. Welby*, 2 Ves. & Beam. 190, 191.

³ See *Tibbits v. Tibbits*, 19 Ves. 662, 663; S. C. 2 Meriv. R. 96, note *a*. Lord

devolve upon the heir as a residuum undisposed of by the will, but belongs to the donee ; the purpose being satisfied for which,

Eldon, in *Green v. Green*, 19 Ves. p. 667, took a distinction between cases of election arising under deeds and those arising under wills, and said : “ I have looked into all the text-writers, the cases reported, and in all manuscripts of which they are in possession, to see how far the doctrine of this court is settled, whether election requires the party to give up the whole, or only to make compensation for that which he does not permit to go according to the instrument against which he claims. It is impossible to reconcile the doctrine as it is to be collected from the whole mass of the cases ; the text in some asserting that the party must abide by the instrument *in toto* ; in others, according to the language of Lord Chief Justice De Grey, in *Pulteney v. Lord Darlington*, that the devised interest is to be sequestered, until satisfaction is made to the disappointed devisee. It is remarkable that, in all the cases except one, *Bigland v. Huddleston*, the question arose upon wills, affecting title under other instruments. But in that case, although it was argued that the doctrine of election does not apply to a deed, it was determined that it does. And it seems to have been thought that the party, having some other interest, sought to be affected by the deed, must either give up altogether what he is to take under it, or must abide by it altogether. When it is settled that the principle of election does not apply to a deed, as it is a contract, it is very difficult to say, compensation only is to be made. In this instance, the defendant's father, on his marriage, agrees to settle the Lawford estate, and makes other provisions, thereby becoming a purchaser of the estate of his wife ; and, being tenant in tail, he did not effectually convey by suffering a recovery. The question in equity, therefore, is, whether the son shall take his mother's estate, without making good that contract under which his mother's estate was purchased. And I incline to think that, electing against a settlement, he is bound to give up the whole benefit to which he is entitled under it, and not merely to make compensation. I do not believe that it will be possible, satisfactorily, to settle this question without doing that which I find impossible, and which, under the present pressure of business, cannot be expected from the Registers, to enable me to interpret the language of the court, as it appears in the reports, by looking at the decrees ; but my present opinion, subject to contradiction upon such a search, and to what may be urged on hearing the cause, is, that a man, claiming under a marriage settlement, is a purchaser under it ; and, if he will not give the price intended by the parties to be paid at his cost, he cannot take under it ; and, therefore, this defendant must give up altogether the estates comprised in this settlement, if he chooses to insist on his title to the Lawford estate. In one of the latest cases, *Thellusson v. Woodford*, where this doctrine is very ably discussed, it is laid down generally, that a person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can ; and, therefore, having an interest under a will shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will ; the principle of election being plain and intelligible, that, if a person being about to dispose of his own property, includes, in his disposition, either from mistake or not, property of another, an implication arises that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition. That was upon a will ; yet there is authority enough to say,

alone, courts of equity will control his legal right.¹ In this respect, the doctrine of courts of equity differs, or has been supposed to differ, from that laid down in the civil law. In that law (it is said) an election against the will amounts to an absolute renunciation and forfeiture of all the bounty given by the will; and compensation to the disappointed claimants is unknown.²

that, in that case, the party is only to give up sufficient to compensate those who are disappointed; but my difficulty on a marriage settlement is, that it operates a contract by the parties for all who are to take under it; and how one shall take the subject and retain the price. I doubt whether the principle, stated by Lord Chief Justice De Grey, 'that the equity of this court is to sequester the devised interest *quousque*, until satisfaction is made to the disappointed devisee,' can apply to such a case as this. Is it possible, in a court of equity, to say, that, where a man purchases his wife's estate for the issue of the marriage, his son shall be permitted to withhold the price, and disappoint that contract of which he takes the benefit? " But see Mr. Belt's note to *Freke v. Lord Barrington*, 3 Bro. Ch. R. 285, note (3).

¹ Mr. Swanston's note in *Gretton v. Haward*, 1 Swanst. 433; *Green v. Green*, 2 Meriv. R. 93; *Tibbits v. Tibbits*, 2 Meriv. R. 96, note; S. C. *Jacob*, R. 317; 1 Powell on Devises, by Jarman, 435 and note. This note of Mr. Swanston contains an elaborate review of all the leading dicta and authorities; and settles down into the doctrine stated in the text. See also *Pulteney v. Darlington*, cited in *Lady Cavan v. Pulteney*, 2 Ves. Jr. 560, and 1 Swanst. 438, note, and Lord Rosslyn's judgment in 2 Ves. Jr. 560; *Welby v. Welby*, 2 Ves. & Beam. 190, 191; *Ranclyffe v. Parkyns*, 6 Dow, R. 149; *Dashwood v. Peyton*, 18 Ves. 49 (a); *Rich v. Cockell*, 9 Ves. 379; 1 Powell on Devises, by Jarman, 435, and note; *Ker v. Wauchope*, 1 Bligh, R. 1. From what has been stated by Swanston in a preceding note (1 Swanst. 396, note), the civil law is, in his view, different; the election against the will being a forfeiture of the whole bounty of the testator. Mr. Sugden (*Sugden on Powers*, ch. 6, § 2, p. 380, 381, 3d edit.) insists, that the true rule in the English law is, or should be, the same.

² *Ante*, § 1079. — Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 396, 397. — The propriety of this doctrine of courts of equity, in regard to both points, admits of a most ample vindication, however artificial it may at first seem upon a superficial survey. It has been expounded and vindicated by the same learned writer in a masterly commentary; and his language scarcely admits of abridgment, without injury to its force. "Assuming," says he, "that the doctrine of election is equitable only, the infliction of forfeiture on a devisee, electing to take against the will, beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. By the assumption, the devise of the testator's property has vested the legal estate in the devisee. But a court of equity (in the contemplation of which his conscience is affected by the implied condition), interfering to control his legal right, for the purpose of executing the intention of the testator, is justified in its interference, so far only as that purpose requires. In the common case of election to take against a will, containing a devise of the property of the testator to his heir,

§ 1086. In regard to the point, when an election may be insisted on, or not, everything must (it is obvious) depend upon the land and a second devise of the property of the heir to a stranger, the express intention of the testator, that the heir should enjoy the subject of the first devise, and the stranger the subject of the second, is defeated by the refusal of the heir to convey the latter. And a court of equity, therefore, restrains him in the enjoyment of the first, till the condition, under which, in the contemplation of that court, it was conferred on him, is satisfied. The intention of the testator having become impracticable in the prescribed form, is executed by approximation, or, in the technical phrase, *cy pres*. The devise to the stranger, rendered void as a gift of the specific subject, is effectuated as a gift of value, and effectuated at the expense of the heir by whose interference its strict purport has been defeated. By this arrangement, the intention of the testator in favor of the stranger, though defeated in form, is, in substance, accomplished; his intention, in favor of the heir, equally express, remains to be considered. If the value of the estate retained by the heir exceeds the value of the estate designed for him, his own act is his indemnity. The benefit which he enjoys transcends the intention of the testator. But if the value of the estate of which the court deprives him exceeds the value of the estate of which he deprives the devisee, what disposition is to be made of the surplus? Considered as a gift of value, (and on that principle the equitable arrangement is founded,) the devise to the stranger entitles him to an equal amount; but is no authority for bestowing on him more. And the undisputed intention of the testator being, that the subjects of both devises should be enjoyed by the heir and the devisee, what is not transferred to the devisee must remain with the heir. A court of equity, which assumes jurisdiction to mitigate the rigor of legal conditions, and substitute for a formal, a substantial performance, would act with little consistency in enforcing, by the technical doctrine of forfeiture, to the eventual disappointment of the testator's intention, a condition, not expressed in the will, but supplied by the construction of the court for the single purpose of executing that presumed intention. In the instance of pecuniary claims, the question can scarcely arise; since in a choice between two sums of money no probable motive exists for electing the smaller. But, supposing that case, as a gift to a stranger of the benefit of a settlement, under which the heir of the testator was entitled to £1,000, and a bequest of £5,000 to the heir, and election by him, to take under the settlement; by the deduction of £1,000 from the bequest, in satisfaction of the disappointed legatee, and by payment to the heir of the remaining £4,000, together with the sum due under the settlement, the intention of the testator would be executed in substance, though not in form. The heir would take £5,000, and the legatee £1,000. By any other arrangement that intention, which must inevitably be violated in form, would be substantially defeated. The case of specific gifts may, indeed, involve some difficulty of appreciation, by the existence of local attachments, which admit neither accurate estimation nor adequate compensation. But it is on the principle of appreciation that the court interferes, to transfer to one party that which is expressly, and, at law, effectually given to another. And the difficulty has been repeatedly encountered. Should any case present impediments of this nature, practically insurmountable, the doctrine of compensation might become, in that instance,

guage of the particular will;¹ and it is difficult, therefore, to lay down many general rules on the subject. On the one hand it may be stated, that, in order to raise a case of election there must be a clear intention, expressed on the part of the testator, to give that which is not his property.² A mere recital in a will, that A. is entitled to certain property, but not declaring the intention of the testator to give it to him, would not be a sufficient demonstration of his intention to raise an election.³ So, if a debtor, by his will, should recite the amount of the debt, and erroneously calculate the sum, and direct the payment of it, and also should bequeath to the creditor a legacy; in such a case, the creditor would not be put to his election. But he might claim both, and dispute the calculation of the amount; for, in such a case, it is not clear that the testator did not mean to pay the full amount of the actual debt.⁴

§ 1087. Upon the same ground, a case of election cannot ordinarily arise where property is devised in general terms; as, a devise of "all my real estate in A.," which estate is subject to the claims of a devisee or legatee; for it is not apparent that he meant to dispose of any property but what was strictly his own, subject to that charge.

§ 1087 a. Upon similar grounds, where a testatrix gave a legacy to B., in satisfaction of all claims upon the estate, he having, at the time, a claim upon the testatrix, in respect to a legacy under the will of C., it was held, that evidence of there being no other claim by B. against the testatrix, was inadmissible; and that B. was not, therefore, compellable to elect between the benefit under the will of the testatrix, and that of C.⁵ The obvious reason for the decision is, that the language of the testatrix did not, by any means, clearly point to any extinguishment of the claim under

inapplicable; but would not for that reason cease to be the general rule of the court. By the doctrine of compensation, and the process of sequestration for executing it (though justly described as a strong operation), the intention of the testator is, so far as circumstances admit, effected. By the doctrine of forfeiture, that intention would be defeated." 1 Swanst. R. note, p. 441, 442.

¹ See *Thompson v. Thompson*, 2 Strobbart, 48; *McElfresh v. Schely*, 2 Gill, 182.

² *Attorney-General v. Earl of Lonsdale*, 1 Sim. R. 105.

³ *Dashwood v. Peyton*, 18 Ves. 41; *Forrester v. Cotton*, Ambler, R. 388; *S. C.* 1 Eden, R. 532, 535, and note (c); *Blake v. Bunbury*, 1 Ves. Jr. 515, 523.

⁴ *Clarke v. Guise*, 2 Ves. 617, 618.

⁵ *Dixon v. Samson*, 2 Younge & Coll. 566.

the will of C., and might well be satisfied by supposing it used solely with reference to any claims *ex directo* against her estate.

[* § 1087 *b*. Where a residuary devise of real estate was given in lieu and discharge of all debts due from the testator to the devisee, who died intestate three days after the testator, it was held, as between the heir and executor of the devisee, that, it not being manifestly for the disadvantage of the devisee to retain the devised estate, the court could not presume a disclaimer by her; consequently the heir was entitled to the estate, and the debts were discharged.¹ But the court intimate that they might have presumed a disclaimer, if it had appeared to be manifestly for the disadvantage of the devisee to retain the estate. Where the testator bequeathed property in stocks, which he had purchased in the name of himself and wife, to his brothers, and also made a provision for his wife, it was held that the wife was put to her election in regard to the stocks.² Where an inchoate settlement between husband and wife of the wife's estate, accruing during coverture, is in part carried into effect during his life, the settlement not being binding, is nevertheless valid as far as carried into effect, at the election of the wife, after the husband's decease. But if she elect not to perform her covenant, she cannot claim any benefit under the settlement.³]

§ 1088. Again; if a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of her dower, it would create a case of election.⁴ But such an intention must be clear and free from ambiguity. And it will not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own, subject to dower. There is no repugnancy in such a devise or bequest to her title to dower.⁵ Besides, the right to dower being in

¹ [* *Harris v. Watkins*, 2 Kay & J. 473.

² *Grosvenor v. Durston*, 25 Beavan, 97.

³ *Anderson v. Abbott*, 23 Beavan, 457.]

⁴ 3 Wooddes. Lect. 59, p. 493; *Arnold v. Kemstead*, Ambler, R. 466; S. C. 2 Eden, R. 237, and note, and cases therein cited; 1 Eq. Abridg. 218, B. 1, pl. 1; *Villareal v. Galway*, Ambler, R. 682; S. C. 1 Bro. Ch. R. 292, notes; *Fuller v. Yates*, 8 Paige, R. 325.

⁵ *Ibid.*; *French v. Davies*, 2 Ves. Jr. 576, 577; *Lawrence v. Lawrence*, 2 Vern. 366, and Raithby's note; 1 Swanst. R. 398, note; *Greatorex v. Cary*, 6 Ves. 615; *Kitson v. Kitson*, Prec. Ch. 352; *Foster v. Cook*, 3 Bro. Ch. R. 347; *Fuller v. Yates*, 8 Paige, R. 325.

itself a clear legal right, an intent to exclude that right by a voluntary gift ought to be demonstrated, either by express words, or by clear and manifest implication. In order to exclude it, the instrument itself ought to contain some provision, inconsistent with the operation of such legal right.¹ So, the mere gift of an annuity

¹ *Birmingham v. Kirwan*, 2 Sch. & Lefr. 452, 453. See also *Pearson v. Pearson*, 1 Bro. Ch. R. 292, and Mr. Belt's note; *Norcott v. Cordon*, 14 Sim. 258; *Lord Dorchester v. Earl of Effingham*, Cooper, Eq. R. 319; 3 Wooddes. Lect. 59, p. 403; 4 Kent, Comm. Lect. 55, p. 57, 58. In *Harrison v. Harrison* (1 Keen, R. 767), Lord Langdale said: "The principle applicable to cases of this kind is, that where a testator makes provision for his widow out of his real estates, she will not be excluded from dower, unless the enjoyment of dower, together with the provision made by the will, appears to be inconsistent with the intention of the testator, as it is to be collected from the language of the will. The application of this principle has frequently occasioned considerable difficulty, and the cases are somewhat conflicting. A rent-charge to a wife has been held not to be a bar of dower in the absence of circumstances showing an intention to exclude her from it." Lord Redesdale's remarks also on this point, in *Birmingham v. Kirwan*, 2 Sch. & Lefr. 452, deserve to be cited at large. "The principle," says he, "then, that the wife cannot have both dower and what is given in lieu of dower, being acknowledged at law, as well as in equity, the only question in such cases must be, whether the provision alleged to have been given in satisfaction of dower, was so given, or not. If the provision results from contract, the question will be simply whether that was part of the contract. But if the provision be voluntary, a pure gift, the intention must either be expressed in the form of the gift, or must be inferred from the terms of it. It is, however, to be collected from all the cases, that, as the right to dower is in itself a clear legal right, an extent to exclude that right by voluntary gift must be demonstrated either by express words, or by clear and manifest implication. If there be anything ambiguous or doubtful; if the court cannot say, that it was clearly the intention to exclude; then, the averment, that the gift was made in lieu of dower, cannot be supported. And to make a case of election, that is necessary; for a gift is to be taken as pure until a condition appear. This I take to be the ground of all the decisions. *Hitchen v. Hitchen*, Prec. Ch. 133, proceeds clearly on this ground; and all the cases seem to have followed it. And the only question made in all the cases is, whether an intention, not expressed by apt words, could be collected from the terms of the instrument. Cases of this description can be used only to assist the judgment of the court in deciding what may be deemed sufficient manifestation of intention. And the result of all the cases of implied intention seems to be, that the instrument must contain some provision, inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds," &c. In *Fuller v. Yates*, 8 Paige, R. 325, 328, 329, Mr. Chancellor Walworth said: "The right of dower being a legal right, the wife cannot be deprived of it by a testamentary disposition in her favor, so as to put her to an election, unless the testator has manifested his intention to deprive her of her dower, either by express words or necessary implication. It is not pretended, in this case, that the language of the will, in respect to the provisions for the wife, are at all inconsistent with her claims to dower, in

by the testator to his widow, although charged upon all his property, is not sufficient to put her to her election between that and dower, even although the will contains a gift of the whole of the testator's real estate to another person.¹ So, the gift of a portion of his real estate to his widow, for life or during widowhood, is not sufficient to put her to an election as to the residue of his real estate.² The reason is the same in all these cases.

[* § 1088 *a*. In the late case of *Bending v. Bending*,³ the subject of the wife's duty to elect between a provision in the will of the husband and her right of dower, is examined at great length, and the conclusion reached, that the law of the Court of Chancery, at the present day, is that laid down by Lord Redesdale,⁴ that if you find anything in the will which is inconsistent with the assertion on the widow's part of her right to have one third of the land set out by metes and bounds; that raises a case of election. The rule laid down by Lord Thurlow, in *Foster v. Cook*,⁵ is that where the testator says, "I give all *my* estate," he does not mean to give *his wife's* estate which her right of dower is. And Lord Alvanley, in *Strahan v. Sutton*,⁶ intimates an opinion that there must appear from the will a clear purpose not to give the devise, in addition to dower, in order to put the wife to her election. And Lord St. Leonards, when Chancellor of Ireland, in *Hall v. Hill*,⁷ held that to put the wife to her election, there must be a clear repugnance between the devise to the wife and her right to have dower set out by metes and bounds. This may now fairly be regarded as the settled rule of the English equity law upon the subject.⁸]

the residue of the testator's real estate. The cases on the subject of implied manifestation of intention to exclude the right of dower, appear to establish this principle, that to put the wife to her election, the will must contain provisions which are wholly inconsistent with her claim of dower in the particular portion of the estate as to which the claim of dower is made." Mr. Eden's note to *Arnold v. Kemstead*, 2 Eden, R. 237, is very valuable on this subject.

¹ *Holdich v. Holdich*, 2 Y. & Coll. New R. 18, 21, 22.

² *Ibid*.

³ [* 3 Kay & Johnson, 257.

⁴ *Birmingham v. Kirwan*, 2 Sch. & Lef. 449.

⁵ 3 Brown's C. C. 347.

⁶ 3 Vesey, 249.

⁷ 1 Dru. & Warren, 107.

⁸ *Ellis v. Lewis*, 3 Hare, 310. Opinion of Vice-Chancellor Wigram, Id. 313, 315; *Chalmers v. Storil*, 2 Ves. & B. 222; *Dickson v. Robinson*, Jac. 503; *Roberts v. Smith*, 1 S. & Stu. 513; *Gibson v. Gibson*, 1 Drewry, 42.]

§ 1089. It is upon a similar ground, that the doctrine of election has been held not to be applicable to cases, where the testator has some present interest in the estate disposed of by him, although it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will, or (as it is sometimes called) a demonstration plain, or necessary implication on his part, to dispose of the whole estate, including the interest of third persons, he will be presumed to intend to dispose of that which he might lawfully dispose of, and of no more.¹

§ 1090. Other exceptions may easily be put to the general doctrine of election. Thus, for instance, if a man should, by his will, give a child, or other person, a legacy or portion, in lieu or satisfaction of a particular thing expressed, that would not exclude him from other benefits, although it might happen to be contrary to the will; for courts of equity will not construe it, as meant in lieu of everything else, when the testator has said it is in lieu of a particular thing.²

§ 1091. Again; if a legatee should decline one benefit charged with a portion, given him by a will, he would not be bound to decline another benefit, unclogged with any burden, given him by the same will.³ So, if a legatee cannot obtain a particular benefit, designed for him by a will, except by contradicting some part of it, he will not be precluded by such contradiction, from claiming other benefits under it. The ground of all these exceptions is, that it is not apparent, from the face of the will, that the testator meant to exclude the party from all benefits under the will, unless, in all respects, the purposes of the will were fulfilled by him.⁴

¹ *Ranclylfe v. Parkyns*, 6 Dow, R. 149 to 179, 185; *Blake v. Bunbury*, 1 Ves. Jr. 515, 523.

² *East v. Cook*, 2 Ves. 23; *Dillon v. Parker*, 1 Swanst. R. 404, 405, note.

³ *Andrews v. Trinity Hall*, 9 Ves. 534; 1 Swanst. 402, note.

⁴ Mr. Swanston, in his learned note on this point, says (1 Swanst. R. 405): "The rule of not claiming by one part of an instrument in contradiction to another has exceptions (*Lord Hardwicke*, 2 Ves. 33, and see *Vern. & Scriv. 53*); and the ground of the exceptions seems to be, a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election. Several cases have been, and several more may be, in which a man, by his will, shall give a child, or other person, a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the court will not construe it as meant, in lieu of everything else, when he has said a particular thing. (*Lord Hardwicke*, *East v. Cook*, 2 Ves. 33.) Upon

But, if it should be so apparent, or fairly inferable from the nature of the different benefits conferred by the will, there the legatee would be put to his election, to take all or to reject all.¹

§ 1092. It may be added, that the doctrine of election is not applied to the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claims upon other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration, and *ex debito justitiæ*.²

that principle it was decided in *Bor. v. Bor*, 3 Bro. P. C. ed. Toml. 167 (see *Vern. & Scriv.* 53, 54), that the testator, having, by express proviso, made a disposition, in the event of his not possessing power to devise certain estates, no implied condition arose against the heir, disappointing the devisee, but complying with the proviso. So a legatee, who cannot obtain a benefit designed for him by the will, except by contradicting some part of it, will not be precluded, by such contradiction, from claiming other benefits under it. (*Huggins v. Alexander*, cited 2 Ves. 31.) The intention being equal in favor of each part of the testamentary disposition, no reason is afforded for controlling one, in order to accomplish the other. Under a will, containing a bequest to the testator's widow in satisfaction of all dower or thirds, which she might claim out of his real or personal estate, or either of them, and a residuary bequest which failed, the widow, accepting the specific bequest, was not excluded from her distributive share of the undisposed residue. For if the court could (which it cannot) on a question between the next of kin, advert to the will, it would find there no evidence of an intention to exclude the widow in their favor." (*Pickering v. Lord Stamford*, 3 Ves. Jr. 332, 492.) Other exceptions might be mentioned; as, for example, the doctrine of election does not apply, as between appointees under a power executed by will, where there is an excessive execution of the power, so that it is void as to some of the appointees, and good as to others. In such cases, the appointees, whose shares are valid, will participate equally with those whose shares are void, in the property of which the appointment fails. 1 *Powell on Devises* by Jarman, 430, note (b); *Id.* 440; *Bristow v. Ward*, 2 Ves. Jr. 336; *Sugden on Powers*, ch. 6, § 2, p. 384, 385 (3d edit.).

¹ *Talbot v. Earl of Radnor*, 3 Mylne & Keen, 252.

² *Kidney v. Coussmaker*, 12 Ves. 154; 1 *Powell on Devises*, by Jarman, 437, note (5). The Master of the Rolls, in *Kidney v. Coussmaker* (12 Ves. 154), speaking on this subject, says: "Another objection, made for the widow, is, that the creditors take a benefit under the will of the testator by the devise for payment of the debts generally; and, therefore, they shall not be permitted to disappoint that part of the will, by which a provision is made for the widow; that is, that the doctrine of election is to be applied to creditors. It is utterly inapplicable. It never has been so applied; and half the decrees upon marshalling assets are wrong, if there is any ground for that claim. It is true, creditors by simple contract cannot have any right, except by marshalling against the real estate; unless the testator thinks fit to devise it for satisfaction of the debts generally. Yet they have never been held to stand in the same light, as legatees. When the testator

§ 1093. On the other hand, it is sufficient to raise a case of election in equity, that the testator does dispose of property which is not his own, without any inquiry whether he did so, knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own. If the property was known not to be his own, it would be a clear case of election. If it was supposed erroneously to be his own, still, there is no certainty that his intention to devise it would have been changed by the mere knowledge of the true state of the title; and the court will not speculate upon it.¹ So, although a part of the benefits proposed by a will should fail, the remainder may constitute a case for an election.²

§ 1094. Upon the ground of intention, also, where a testator has an absolute power to dispose of the subject, and an intention

lets in such creditors by a charge, it is now settled, whatever doubt may formerly have been entertained upon it, that creditors, under a charge of debts and legacies, are to be paid in preference to legatees; and though the statute of fraudulent devises would undoubtedly prevent a devise for payment of legacies, so as to disappoint creditors by specialty, it would not prevent a devise for payment of debts generally; though the effect would be to let in creditors by simple contract, to the prejudice of creditors by specialty. If there is any foundation for this doctrine of election, the case never could have happened, where there was a charge upon any part of the estate for debts; whereas the creditors by specialty are permitted, and the creditors by simple contract are, by marshalling, permitted to follow the devised estates, if there are no estates descended; or, if the descended estates have been applied. In this case the decree is wrong upon this doctrine; for the legatees are disappointed by the specialty creditors taking the personal estate." See also Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. R. 408; *Day v. Day*, 2 P. Will. 418; *Earl of Darlington v. Pulteney*, 3 Ves. 385; *Carr v. Eastabrooke*, 3 Ves. 564.

¹ *Whistler v. Webster*, 2 Ves. Jr. 370; *Thellusson v. Woodford*, 13 Ves. 220; *Welby v. Welby*, 2 Ves. & Beam. 199; Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 407; 1 Powell on Devises, 435, Jarman's note. This is now the established doctrine, although there are former declarations of opinion to the contrary, which proceeded upon the grounds of the civil law already stated. (*Ante*, § 1078.) See *Cull v. Showell*, Ambler, R. 727, and Mr. Blunt's note (4); 3 Wooddes. Lect. Appx. 1; *Id.* Lect. 59, p. 493, 494; 2 Sch. & Lefr. 267; *Forrester v. Cotton*, 1 Eden, R. 532, 535, and notes (a) and (c); S. C. Ambler, R. 389, 390. The doctrine of the civil law is apparently different. "Quod autem diximus, alienam rem posse legari, ita intelligendum est; si defunctus sciebat alienam rem esse; non si ignorabat. Forsitan, enim, si scivisset alienam rem esse, non legasset." Inst. Lib. 2, tit. 20, § 4. We have seen, that the English doctrine takes the opposite view, from the doubt, whether the intention would have been changed by knowledge of the fact. See also Inst. Lib. 2, tit. 20, § 10, 11, where other curious cases are put.

² *Newman v. Newman*, 1 Bro. Ch. R. 186; 1 Swanst. R. 402, note.

is clearly expressed in this will to exercise that power, it will be sufficient to raise a case of election.¹ Therefore, if a testator, having an absolute power to dispose of an estate, should devise it to his heir; although, in such a case, the heir would take by descent, and the devise be inoperative, whether he admitted or disputed the will; yet, as to another estate of the heir, which was disposed of by the testator in his will without title, he would be put to his election. For, in every such case, the heir ought to elect between the estate devised, which comes to him by the bounty of the testator, and his own claims, which are adverse to the will. The estate descending to the heir under an election made by him to claim against the will, ought to be subject in his hands to the same implied conditions, as if he had taken it by devise.² So, if, upon the language of a will, it is apparent that it is the testator's intention to dispose of all his property at the time of his death, that intention will be considered as raising a case of election in an heir, who claims title to the after-purchased real estate of the testator, and, at the same time, is a devisee under the will. Thus, where a testator made a devise and bequest of all his estate and effects, both real and personal, which he should die possessed of, interested in, or entitled to, to trustees, for the benefit of his grandchildren, one of whom was his heir at law; and he afterwards purchased other real estate; it was held, that, upon the true interpretation of the words of the will, the testator meant to pass to the trustees, not only the estates he had at the date of the will, but all that he should own and possess at the time of his death; and, therefore, the heir at law ought to be put to his election.³

§ 1095. It was, at one time, supposed, that the doctrine of election was not applicable to the case of persons claiming a remote interest in property disposed of in a manner adverse to other rights; as, for instance, to a remainder-man, claiming after an estate tail

¹ Sugden on Powers, ch. 5, § 2, p. 384 (3d edit.); *Whistler v. Webster*, 2 Ves. Jr. 367.

² Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. R. 402; *Welby v. Welby*, 2 Ves. & Beam. 187, 190; *Thellusson v. Woodford*, 13 Ves. 224, and note (a); *Anon. Gilb. Eq. R.* 15. See Sugden on Vendors, ch. 4, p. 128, note (3) (2d edit.).

³ *Churchman v. Ireland*, 4 Sim. R. 520; *S. C.* 1 Russ. & Mylne, 250; *Thellusson v. Woodford*, 13 Ves. 209; 1 Dow, Parl. R. 249; overruling *Back v. Kett*, Jacob. R. 534; *Nayler v. Wetherell*, 4 Sim. R. 114. See *Allen v. Anderson*, 5 Hare, R. 169.

in the property disposed of.¹ The principle of such an exception seems extremely questionable; for (as has been well remarked) the doctrine of election is applied to interests, not in respect of their amount, but of their inconsistency with the testator's intention. And to assume their remoteness, or their value as a criterion of the existence or absence of that intention, would introduce great uncertainty, which, in questions of property, is perhaps the worst defect of the law.²

§ 1096. It may be added, that, when a party, by his will, disposes of the absolute right in property, in which he has a limited interest only, he necessarily shows an intention to extinguish all other conflicting adverse rights, whether they are present or future, vested or contingent; and, consequently, it must be wholly unimportant, whether the interests, so extinguished, are great or small, immediate or remote, valuable or trifling. The duty of election, then, so far as intention goes, is equally the same in strength and presumption in all cases of this sort; as it imports the gift of one thing to be in lieu or extinguishment of the other. Accordingly, the doctrine is now well established, that the doctrine of election is equally applicable to all interests, whether they are immediate or remote, vested or contingent, of value or of no value, and whether these interests are in real or in personal estate.³

¹ See *Bor v. Bor*, cited 3 Bro. Parl. Cas. by Tomlins, 178, note; 1 Swanst. 407, note.

² Mr. Swanston's note, 1 Swanst. R. 408.

³ *Wilson v. Lord Townsend*, 2 Ves. Jr. 697; *Dillon v. Parker*, 1 Swanst. 408, note; *Webb v. Earl of Shaftesbury*, 7 Ves. 488; 1 Powell on Devises, by Jarman, p. 434, note; 2 Madd. Ch. Pr. 40; *Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 537*. — A curious point has arisen in regard to the doctrine of election, in cases where a will is not executed, so as to pass real estate under the statute of frauds, and yet it is good as a will of personalty. The question is, whether the heir can take a bequest of personalty under the will, without at the same time confirming the devises made of the real estate. It has been decided, that in a will of freehold estates, not so executed as to pass real estate, no such case of election arises; and that the devises are to be deemed blotted out of the will, and the will to be read as if they were not contained in it; although it would be otherwise if there was an expressed condition annexed to the bequest of the personalty. But, in a case of a specific devise of unsurrendered copyhold, the heir would be put to his election. Sir William Grant, in *Brodie v. Barry* (2 Ves. & Beam. 130), said: "I do not understand why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate, annexed to a gift of personal property; as it is admitted it must, when

§ 1097. Questions have also arisen in courts of equity, as to what acts or circumstances should be deemed an election on the part of the person bound to make it. Positive acts of acceptance or of renunciation are not indispensable. Presumptions equally strong may arise from long acquiescence, or from other circumstances of a stringent nature.¹ Upon such a subject no general rule can be laid down; but every case must be left to be decided upon its own particular circumstances rather than upon any definite abstract doctrine.² Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights.³ When this is ascertained affirmatively, it may be further necessary to consider, whether the party intended an election;⁴ whether the party was competent to make an election; for a *feme covert*, an infant,⁵ or a lunatic will not be bound by an election;⁶ whether he can restore the other

such condition is *expressly* annexed to such gift. For if, by a sound construction, such condition is rightly inferred, from the whole instrument, the effect seems to be the same as if it were expressed in words. And then, if it be rightly decided that a will, defectively executed, is not to be read against the freehold heir, I have been sometimes inclined to doubt, whether any will ought to be read against the copyhold heir; a will, however executed, being as inoperative for the conveyance of copyhold estate (without a surrender) as a will, defectively executed, is for the conveyance of a freehold estate." Lord Kenyon, in *Cary v. Askew* (1 Cox, R. 344), and Lord Eldon, in *Sheddon v. Goodrich* (8 Ves. 496, 497), expressed doubts of a similar nature. But all these judges admitted the distinction to be clearly established by the authorities. See *Hearle v. Greenbank*, 3 Atk. 715; S. C. 1 Ves. 306, 307; *Thellusson v. Woodford*, 13 Ves. 220, 221; *Boughton v. Boughton*, 2 Ves. 12; *Allen v. Poulton*, 1 Ves. 121; *Cookes v. Hellier*, 1 Ves. 234; Mr. Swanston's note, 1 Swanst. R. 406; Mr. Jarman's note to 1 Powell on Devises, 440; *Allen v. Anderson*, 5 Hare, R. 168.

¹ *Tibbits v. Tibbits*, 19 Ves. 662.

² [In *Reynard v. Spence*, 4 Beavan, 103, where a widow had received an annuity for five years, it was held she had not elected.]

³ *Dillon v. Parker*, 1 Swanst. 359, 381; *Edwards v. Morgan*, 13 Price, R. 782; S. C. 1 McClel. 541; 1 Bligh, R. 401. [* See the late case of *Thurston v. Clifton*, 21 Beavan, 447, where this subject is extensively discussed, and the authorities reviewed.]

⁴ *Ibid.*; *Stratford v. Powell*, 1 Ball & Beatty, 1; *Tiernan v. Roland*, 3 Harris, 430.

⁵ See *Addison v. Bowie*, 2 Bland. 606.

⁶ *Frank v. Frank*, 3 Mylne & Craig, 171. [And see *Wall v. Wall*, 11 Jurist, 403, which case, however, it may difficult to reconcile with *Whittle v. Henning*, 2 Phillips, 731; *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 131.] See, *ante*, § 1088 a.

persons affected by his claim to the same situation, as if the acts had not been performed; or the acquiescence had not existed; and, whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries, upon its general doctrine of not entertaining suits upon stale demands, or after long delays.¹

§ 1098. Questions have also arisen in courts of equity, as to the time when, and the circumstances under which, an election may be required to be made. The general rule is, that the party is not bound to make any election until all the circumstances are known, and the state, and condition, and value of the funds are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice.² If, therefore, he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him.³ And, on the other hand, he will be entitled, in order to make an election, to maintain a bill in equity for a discovery, and to have all the necessary accounts taken to ascertain the real state of the funds.⁴

§ 1099. SATISFACTION may be defined in equity to be the donation of a thing, with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in courts of equity as a matter of presumption, where a man, being under an obligation to do an act, (as to pay money), does that by will, which is capable of being considered as a performance or satisfaction of it, the thing performed being *ejusdem generis* with that which he has engaged to perform. Under such circumstances and in the absence of all countervailing circumstances, the ordinary presumption in courts of equity is, that the testator has done the act in satisfaction of his obligation.⁵

¹ Mr. Swanston's note, 1 Swanst. 382, where the principal authorities are collected. See *Brice v. Brice*, 2 Molloy, R. 21.

² *Ibid.*; *Newman v. Newman*, 1 Bro. Ch. R. 186; *Boynton v. Boynton*, 1 Bro. Ch. R. 445; *Wake v. Wake*, 3 Bro. Ch. R. 255; S. C. 1 Ves. Jr. 335; *Whistler v. Webster*, 2 Ves. Jr. 371; *Chalmers v. Storril*, 2 V. & Beam. 222; 2 Fonbl. Eq. B. 4, Pt. 1, Ch. 1, § 5, note (I).

³ *Ibid.*; *Kidney v. Coussmaker*, 12 Ves. 136, 152.

⁴ *Ibid.*; See *Pigott v. Bagley*, 1 McClel. & Younge, 569.

⁵ 1 Powell on Devises, by Jarman, 433, note (4).

§ 1100. It is certainly not a little difficult to vindicate the extent to which this doctrine has been carried in courts of equity, as a matter of presumption. What is given by a will ought, from the character of the instrument, ordinarily to be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument;¹ or, as it has been well expressed, whatever is given by a will is, *prima facie*, to be intended as a bounty or benevolence.² Under such circumstances, the natural course of reasoning would be, that, in order to displace this presumption, a clear expression of a contrary intention should be made out on the face of the will.³ But the doctrine of courts of equity has proceeded upon an opposite ground; and the donation is held to be a satisfaction, unless that conclusion is repelled by the nature of the gift, the terms of the will, or the attendant circumstances. For, it has been said, that a man shall be intended to be just, before he is kind; and when two duties happen to interfere at the same point of time, that which is the most honest and best is to be preferred.⁴

¹ Clark v. Sewel, 3 Atk. 97; Clarke v. Bogardus, 12 Wend. 67.

² Eastwoode v. Vincke, 2 P. Will. 616.

³ But see Weall v. Rice, 2 Russ. & Mylne, 267, where Sir John Leach intimates that the rule is as it ought to be, but without stating any reasons. See also Jones v. Morgan, 2 Younge & Coll. 403, 412.

⁴ 2 Fonbl. Eq. B. 4, Pt. 1, ch. 4, § 5, note (l). In Pym v. Lockyer, 5 Mylne & Craig, 29, 35, Lord Cottenham said: "All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitute for, and not as an addition to that first given; but, when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts. The first question to be asked is, whether the sums given are to be considered as portions, or as mere gifts; and, upon this subject, certain rules have been laid down, all intended to ascertain and to work out the intention of the giver. In the case of a parent, a legacy to a child is presumed to be intended to be a portion, because providing for a child is a duty which the relative situation of the parties imposes upon the parent; but that duty which is imposed upon a parent, may be assumed by another, who, for any reason, thinks proper to place himself, in that respect, in the place of a parent; and, when that is so, the same presumption arises against his intending a first gift to take effect as well as a second; because both, in such cases, are considered to be portions. Whether the donor had, for this purpose, assumed the office of a parent, so as to invest his gift with the

§ 1101. But, although this may be fair reasoning, where there is a deficiency of assets to satisfy both claims or duties, yet it is utterly impossible to apply it to the great mass of cases in which the doctrine of implied satisfaction has prevailed, and where there has been no deficiency of assets to discharge all the claims. The truth is, that the doctrine was introduced originally upon very unsatisfactory grounds; and it now stands more upon authority than upon principle. And a strong disposition has been manifested in modern times not to enlarge the sphere of its operation; but to lay hold of any circumstances to establish exceptions to it.¹ We shall presently see that it is somewhat differently applied in cases of creditors, properly so called, from what it is in cases of portions and advancements to children; for, in the latter cases, the presumption of satisfaction is more readily entertained and acted upon more extensively than in the former.²

§ 1102. It is obvious, from this description of the doctrine of satisfaction, that the presumption is not conclusive, but may be rebutted by other circumstances, attending the will. If the benefit given to the donee, possessing the right or claim, is different *in specie* from that to which he is entitled, the presumption of its being given in satisfaction will not arise, unless there be an express declaration, or a clear inference, from other parts of the will, that such is the intention of the testator.³ The presumption

character of a portion, may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken; the question being, merely, whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child, and not merely to bestow a gift. Upon this point, *Powys v. Mansfield*, founded upon *Carver v. Bowles* (2 Russ. & Mylne, 301), and many other cases, is conclusive. Such evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extrinsic circumstances; and, as part of such extrinsic circumstances, the general conduct of the donor towards the family, and particularly towards the other children of it, may, very properly, be included in the consideration of his object and intentions." *Post*, § 1105, note.

¹ *Clarke v. Sewell*, 3 Atk. 97; *Lady Thynne v. Earl of Glengall*, 2 House of Lords' Cases, 153.

² *Ibid*.

³ *Powell on Devises*, by Jarman, 433, note (4).

may be rebutted, not only by intrinsic evidence, thus derived from the terms of the will itself; but it may also be rebutted by extrinsic evidence, as by declarations of the testator touching the subject, or by written papers, explaining or confirming the intention.¹

§ 1103. Thus, for example, land given by a will is not deemed to be given in satisfaction of money due to the devisee; and money given by a will is not deemed to be given in satisfaction of an interest of the legatee in land; unless there is something more in the will explanatory of the intention of the testator.² Accordingly, it was laid down by Lord Hardwicke, in respect to the doctrine of satisfaction, that, when a bequest is taken to be by way of satisfaction for money already due to the donee, the thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given; and that land is not to be taken in satisfaction for money, or money for land.³

§ 1104. In regard also to cases, where the thing given is *ejusdem generis* with that due to the donee, the presumption, that it is given in satisfaction, does not necessarily arise; nor is it, as has been already intimated, universally conclusive. To make the presumption of satisfaction hold in any such cases, it is necessary that the thing substituted should not be less beneficial, either in amount, or certainty, or value, or time of enjoyment, or otherwise, than the thing due or contracted for.⁴ The notion of satisfaction implies the doing or giving of something equivalent to the right extinguished. And it would be a very unjustifiable course to arraign the justice of the testator, by presuming that he meant to ask a favor, instead of performing a duty.

§ 1105. But where the thing substituted is *ejusdem generis*, and it is clearly of a much greater value, and much more beneficial to the donee, than his own claim; there the presumption of

¹ Weall v. Rice, 2 Russ. & Mylne, 251, 263, 268. See Kirk v. Eddowes, 3 Hare, 509; Hall v. Hill, 1 Dru. & War. 118; Twining v. Powell, 2 Colly. 263.

² Bellasis v. Uthwatt, 1 Atk. 426, 427; Bengough v. Walker, 15 Ves. 507, 512; Chaplin v. Chaplin, 3 P. Will. 247.

³ Ibid.; Barrett v. Beckford, 1 Ves. 521; Bengough v. Walker, 15 Ves. 512; Masters v. Masters, 1 P. Will. 423, 424.

⁴ Blandy v. Widmore, 1 P. Will. 324, Mr. Cox's note (1); Lechmere v. Earl of Carlisle, 3 P. Will. 225, 226; Atkinson v. Webb, 2 Vern. 478.

an intended satisfaction is generally allowed to prevail.¹ Whether the presumption of an intended satisfaction, *pro tanto*, ought to be made in any case, where the things are *ejusdem generis*, but less than the claim of the donee, is a matter upon which some diversity of opinion appears to exist; but the weight of authority is certainly in favor of it, in cases of portions and advancements.²

¹ See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); Id. Pt. 2. ch. 2, § 1, note (*a*); Rickman v. Morgan, 2 Bro. Ch. R. 394; 1 Roper on Legacies, by White, ch. 6, p. 317 to 336; Bellasis v. Uthwatt, 1 Atk. 426, Mr. Saunders's note; 2 Roper on Legacies, by White, ch. 18, p. 58 to 108; Weall v. Rice, 2 Russ. & Mylne, 267, 268, 351. See the late important case of Earl of Glengall v. Barnard, 1 Keen, 769; S. C. nom. Lady Thynne v. Earl of Glengall, 2 House of Lords' Cas. 131.

² Ibid. The point has been recently decided by Lord Cottenham. Pym v. Lockyer, 5 Mylne & Craig, 29, 34, 35, 45 to 55; Kirk v. Eddowes, 3 Hare, 509. In the former case, his lordship reviewed the principal authorities, and said: "When, upon the first argument of this case, I had come to the conclusion that the testator had placed himself *in loco parentis*, and that the effect of the portions upon the provisions by the will was, therefore, to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision, if the rule generally received in the profession, and laid down in all the text-books of authority, and apparently founded upon the highest authority, was to regulate the division of the property; the rule to which I refer being, that a portion 'advanced by a father to a child will be a complete ademption of a legacy, though less than the testamentary portion.' (1 Rop. on Leg. 318.) I could not but feel that, in the case before me, and in every other, the effect of the rule would be to defeat the intention of the parent. A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought, therefore, to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced. So far the rule is founded on good sense, and adapted to the ordinary transactions of mankind. The supplying the wants of one child for an advancement is not permitted to lessen or destroy the provisions made for the others, by giving both provisions to the child advanced; but the supposed rule that the larger legacy is to be adeemed by the smaller provision, appears to me not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive of the obvious intention of the parent. Can it be assumed, as a proposition so general as to be the foundation of a rule of property, in the absence of any expressed intention, that the marriage of one child, and the advancing a portion to such child, furnishes ground for

§ 1106. We are, however, carefully to distinguish between cases of satisfaction, properly so called, and cases of the perform-

the father's altering the mode of distributing his property amongst his children, by taking from the portion previously destined for that child, and, to the same extent, adding to the provision for the others? Is it not, on the contrary, the usual course and practice that the father, upon a child's marriage, parts with the control over as little as possible, preferring to reserve to himself the power of disposing of the residue of the portion destined for such child, as its future circumstances and situation may require? In doing so, the father is not influenced only by the natural preference of bounty to obligation, but adopts a course which he may well be supposed to think most beneficial for his children. Where, then, is the ground of the presumption, that he intended, by advancing part of what he had destined as the portion of that child, to deprive that child of the remainder? The argument in favor of the proposition appears to me to be founded upon technical reasoning as to the term "portion," without due consideration of the sense in which that term is used. The giving a portion to a child is said to be a moral debt, but of the amount of which the parent is the only judge; and although the parent has, by his will, adjudged the amount of that moral debt to be a certain sum, he is supposed, by the settlement, to have departed from that judgment, and to have substituted the amount settled; and this only because the one provision and the other are considered as a portion. This, however, assumes the portion settled to be intended as a substitution of the portion given by the will; and such intention, if proved, would remove all doubt; but the question is, whether such intention is to be presumed, in the absence of all proof. Is it not more reasonable to suppose that the intention as to the amount of the portion remains the same, and that the sum settled is only an advance of part of what the will declares to have been the intended amount of the whole? There is no reason for supposing the sum advanced to be the whole portion intended for the child; and if so, there can be no reason for assuming it to be substituted for the whole. The effect of a portion advanced by a parent upon a legacy before given is called an ademption; but if the principle of ademption be applied to this case, the consequence now under consideration will not follow. The gift or alienation of part of what constitutes a specific legacy will not destroy the legacy as to what remains. So, the admitted exceptions to this general rule do not seem very consistent with the existence of that part of it now under consideration. The rule is said not to apply, when the testamentary portion and the subsequent advancement are not *ejusdem generis*. This may be very reasonable, as indicative of intention, but it is not easy to discover why, if one thousand pounds advanced is to be an ademption of a ten thousand pounds legacy, a gift of stock in trade of the value of £1,500 is not to be an ademption of a legacy of £500, which, in *Holmes v. Holmes*, 1 Bro. C. C. 555, it was held not to be. So a testamentary gift of a residue, or part of a residue, is said not to be adeemed by a subsequent advancement, because the amount is uncertain; but, in that case, the child, if sole residuary legatee, takes, as advancement, part of what it would, if no such advancement had been made, have taken as residue. The gift under the will operates, though diminished by the amount of the advancement. The statute of distributions, the customs of London and York, and the whole doctrine of Hotchpot, proceed upon the prin-

ance of agreements or covenants. In the latter cases, the acts of the party are strictly in pursuance of the contract; in the former they are a substitute or equivalent for the contract, and not intended as a fulfilment of it.¹ Some cases, which have actually

ciple that advancement by a parent does not operate as substitution for, but as part satisfaction of, what the child would otherwise be entitled to; the object being to produce equality, and not, according to the rule contended for, inequality, between the children. It appears to me, therefore, that all reasoning and all analogy are against the supposed rule. It remains to be examined whether the authorities are such as to make it my duty to act upon it; and I cannot but express the satisfaction I have felt at having had the cases so thoroughly examined. I think the profession and the public are much indebted to those whose industry and ability have brought the real state of this question so satisfactorily before me." After reviewing the authorities he added: "The result of a careful examination of the authorities is, that there is not sufficient authority to support the supposed rule, but that, on the contrary, the weight of authority is decidedly against it; and as it cannot be supported upon principle, and is, in its operation, generally destructive of the interests which parents have intended for their children, I think it my duty, notwithstanding the manner in which it has been received in the profession, to decline adopting or following it, and, therefore, to declare that the advancements, upon the respective marriages in this case, are to be taken as adempments, *pro tanto* only, of the legacies before given."

¹ In *Goldsmid v. Goldsmid* (1 Swanst. R. 219), the Master of the Rolls said: "An important distinction exists between satisfaction and performance. Satisfaction supposes intention. It is something different from the contract, and substituted for it." The subject is treated more fully in *Roper on Legacies*, by White, vol. 2, ch. 18, § 4, p. 105 to 108. It is there said: "In the discussion of questions of this nature, two descriptions of cases have occurred; the one consists of cases called cases of performance; the other, of cases of satisfaction. The cases considered in the present section are instances of the former class, in which there has been a covenant by a husband, to leave or pay to his wife a sum of money at his death, and he dies intestate; and his wife's distributive share of his personalty, under the statute, is equal to, or more than, the sum stipulated under the covenant. In that case, he is held to have performed, through the operation of the law, what he had covenanted to do. The other case is, where the wife takes a benefit, to an equal or greater extent under the husband's will, to which the same reasoning is not applicable. But, although the bequest is not a performance, still it may be inferred that the testator intended it as a satisfaction of the covenant, so as to raise a case of election. Satisfaction, as Sir Thomas Plumer observes, supposes intention; it is something different from the subject of the contract, and substituted for it. And the question always arises, Was the thing intended as a substitute for the thing covenanted? a question entirely of intent. But, with reference to performance, the question is, Has that identical act, which the party contracted to do, been done? Mr. Cox, in his edition of *Peere William's Reports*, has favored the profession with a valuable note upon this subject." See also *Devese v. Pontet*, *Prec. Ch.* by Finch, p. 240, note; *S. C.* 1 Cox, 188.

passed into judgment, may illustrate this distinction. Thus, where A., on his marriage, by articles, covenanted to leave his wife B., if she should survive him, £ 620 ; and that his executors should pay it in three months after his decease ; and A. died intestate, and without issue, whereby his wife (who survived him) became entitled to a moiety of his personal estate, which was more than the £ 620 ; the question arose, whether the distributive share of B. should be deemed a satisfaction, or rather a due performance, of the covenant ; for the covenant was not broken, the wife being administratrix. And it was held to be a due performance, although it is called in the report a satisfaction.¹ So, where A. covenanted by marriage articles, that his executors should, in three months after his decease, pay his wife £ 3,000 ; and by his will he gave all his property to his executors, in trust, to divide it in such ways, shares, and proportions as to them should appear right. The trust failed, whereby his estate became divisible according to the statute of distributions ; and his wife survived him. It was held, that her distributive share, being greater than £ 3,000, was a satisfaction of the covenant.²

§ 1107. The ground of each of these decisions seems to have been, that there was no breach of the covenant ; and as the widow, by mere operation of law, through the statute of distributions, received from her husband a larger sum than he had covenanted to pay her, it ought to be held a full performance of his covenant. These decisions do not seem to stand on a very firm foundation, as illustrations of the doctrine of satisfaction ; for (as has been well observed) considerable doubt might have been entertained, whether of two claims so distinct, the satisfaction of one ought to be considered as a satisfaction of the other. But courts of equity would now hardly deem it fit to re-examine, and upon principle to discuss the point thus settled by them, which has been at rest

¹ *Blandy v. Widmore*, 1 P. Will. 324, and Mr. Cox's note (1) ; S. C. 2 Vern. 709 ; S. P. *Lee v. Cox*, 3 Atk. 422 ; S. C. 1 Ves. R. 1 ; S. P. *Richardson v. Elphinstone*, 2 Ves. Jr. 463, 464 ; *Haynes v. Mico*, 1 Bro. Ch. R. 129 to 131 ; *Kirkman v. Kirkman*, 2 Bro. Ch. R. 96, 100 ; *Garthshore v. Chalie*, 10 Ves. 9 to 14 ; *Wilcox v. Wilcox*, 2 Vern. 558 ; *Lechmere v. Earl of Carlisle*, 3 P. Will. 225 ; *Rickman v. Morgan*, 2 Bro. Ch. R. 394, 395 ; *Goldsmid v. Goldsmid*, 1 Swanst. 219, 221, and note (c) ; *Wilson v. Pigott*, 2 Ves. Jr. 356 ; *Wathen v. Smith*, 4 Madd. R. 325, 331 ; *Twisden v. Twisden*, 9 Ves. 427.

² *Goldsmid v. Goldsmid*, 1 Swanst. 211.

for more than a century.¹ The distinction, however, between performance of a covenant, and satisfaction of a covenant, which grows out of these decisions, may not be unimportant; for there may be a presumptive performance *pro tanto* in such cases, which will be recognized in equity, whatever may be the rule as to a presumptive satisfaction *pro tanto* in other cases.²

§ 1108. And here it may be remarked, that the doctrine of satisfaction, and also of performance of covenants, arising from bequests in wills, was well known in the civil law;³ and it was probably derived from that source with some variations into our jurisprudence. Thus, in the Digest, a case is put of a father, covenanting on his daughter's marriage to give her a certain sum, as a dotal portion, and afterwards leaving a legacy to her to the same amount; and it was there held, that it amounted to a satisfaction of the portion.⁴ And other cases are put of a like nature, where parol evidence was held admissible to establish the intention of satisfaction.⁵

§ 1109. Questions of satisfaction usually come before courts of equity in three classes of cases: (1.) in cases of portions secured by a marriage settlement; (2.) in cases of portions given by will, and an advancement to the donee afterwards in the life of the testator; (3.) in cases of legacies to creditors. It may be convenient as well as proper, in our brief survey of this subject, to examine the doctrine separately in respect to each of these classes; as the application of it is not, or, at least, may not be, precisely the same throughout in all of them.⁶ The first class may be illustrated by stating the case where a portion or provision is secured to a child by marriage settlement, or otherwise; and the parent or person standing *in loco parentis*, afterwards by will gives the same child a legacy, without expressly directing it to be in satisfaction of such portion or provision. In such a case, if the legacy be of a sum as

¹ Goldsmid v. Goldsmid, 1 Swanst. 211.

² Garthshore v. Chalie, 10 Ves. 9 to 16; Wilcox v. Wilcox, 2 Vern. 558; Blandy v. Widmore. 1 P. Will. 324, Mr. Cox's note (1); 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (l).

³ See *post*, § 1114, and note (6).

⁴ Dig. Lib. 30, tit. 1, l. 84, § 6; *Post*, 1114.

⁵ Dig. Lib. 30, tit 1, l. 123.

⁶ See Hinchcliffe v. Hinchcliffe, 3 Ves. 527, where Lord Alvanley intimated that there might be a difference between cases of portions by settlement, and cases of legacies by will, as to subsequent advancements.

great as, or greater than, the portion or provision ; if it be *ejusdem generis* ; if it be equally certain with the latter, and subject to no contingency, not applicable to both ; and if it be shown that it is not given for a different purpose ; then it will be deemed a complete satisfaction.¹ If the legacy be less in amount than the portion or provision ; or if it be payable at a different period or periods ; then, although there is some diversity of opinion upon the subject, the weight of authority is, that it may be, or will be deemed a satisfaction *pro tanto*, or in full, according to the circumstances.² [And this view has been recently affirmed in the

¹ *Ante*, § 1102, 1103 ; *Bellasis v. Uthwatt*, 1 Atk. R. 527, Mr. Saunders's note ; *Chaplin v. Chaplin*, 3 P. Will. 245, 247 ; 2 Roper on Legacies, by White, ch. 18, p. 68 to 108 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (l) ; 2 Madd. Ch. Pr. 33 ; *Weall v. Rice*, 2 Russ. & Mylne, 267. In this last case, Sir John Leach said : "The rule of the court is, as, in reason, I think it ought to be, that, if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed, that he does not mean a double provision. But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favor of a double provision. But in either case, extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature ; and every judge must decide that question for himself." See also *Jones v. Morgan*, 2 Younge & Coll. 403, 412 ; *Wharton v. Earl of Durham*, 3 Mylne & Keen, 478 ; reversed on appeal to the House of Lords, 10 Bligh, 526 ; 3 Cal. & Finn. 146.

² *Ibid.* ; *Ante*, § 1105 and note ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (l) ; 2 Roper on Legacies, by White, ch. 18, § 1, 2, p. 69 to 95. It is sometimes provided in marriage settlements, that if any advancement on marriage, or otherwise, shall be made by a parent *in his lifetime*, such advancement shall be deemed made as a part, or the whole, of the portion provided for in the settlement, unless the contrary appear in writing. In such cases, it has been made a question whether a legacy, given by the parent by will amounts to a satisfaction *pro tanto*, as an advancement or portion in his lifetime. It has been decided that it is. *Onslow v. Mitchell*, 18 Ves. 490, 494 ; *Leake v. Leake*, 10 Ves. 489, 490 ; 2 Roper on Legacies, by White, ch. 18, § 3, p. 95 to 104. [See *Papillon v. Papillon*, 11 Sim. 644 ; *Fazakerley v. Gillibrand*, 6 Sim. 591. But see *Douglass v. Willes*, 7 Hare, 318.] And (it seems), in such case, it is immaterial, whether it be the gift of a particular legacy, or of a residue. (*Ibid.*) But, a share from the parent, arising from intestacy, would not be deemed a satisfaction. *Ibid.* ; *Twisden v. Twisden*, 9 Ves. 413, 427.

House of Lords after a full review of all the cases on the subject.^{1]}

§ 1110. We have already had occasion to intimate the doubts, which may be justly entertained, as to the correctness of the reasoning, by which courts of equity have been led to these results.² As an original question, at least where the assets are sufficient to satisfy the portion, as well as the legacy, the natural presumption would be, that the testator intended the latter, as a bounty, in addition to the duty already contracted for; a bounty fit for a parent to bestow, and far more reputable to his sense of moral and religious obligation, than a mere dry performance of his positive contract, recognized by law, and resting on a valuable consideration. But here as well as in many other cases, we must be content to declare, *Ita lex scripta est*; — It is established, although it may not be entirely approved. Even a small variance in the time of payment, or other trifling differences, where the value is substantially the same, will not vary the application of the rule, as the present inclination of courts of equity is against raising double portions.³

¹ Lady Thynne v. Earl of Glengall, 2 House of Lords' Cas. 131. [*See also Hopwood v. Hopwood, 5 Jur. N. S. 897.]

² *Ante*, § 1100.

³ *Ibid.*; Onslow v. Mitchell, 18 Ves. 492, 493; Twisden v. Twisden, 9 Ves. 427; Sparkes v. Cator, 3 Ves. 530, 535; 2 Roper on Legacies, by White, ch. 18, § 2, p. 90. But see Weall v. Rice, 2 Russ. & Mylne, 267, 268; where Sir John Leach intimates that the rule is right. [See Earl of Glengall v. Barnard, 1 Keen, 769; affirmed on appeal, 2 House of Lords' Cases, 131, in favor of the rule of the text.] This whole subject is very fully considered in Roper on Legacies, by White, vol. 2, ch. 18, p. 68 to 108. The doctrine, as now held, is thus summed up: "Where a parent is under obligation, by articles of settlement, to provide portions for his children, and he afterwards, by will or codicil, makes a provision for those children, it is a well-established rule of equity, that such subsequent testamentary provision shall be considered a satisfaction or performance of the obligation. We have seen, that, upon questions of satisfaction of debts by legacies, trifling points of difference between the debts and legacies were adjudged sufficient to repel the presumption of satisfaction. But with respect to the satisfaction of portions, the rule of presumption is much more favored; the inclination of the court of equity being against raising double portions. If, therefore, the legacies be less in amount than the portions, or payable at different periods, the legacies will, notwithstanding, be considered satisfactions, either in full or in part, according to circumstances; but though these circumstances of difference are considered insufficient to rebut the presumption of satisfaction, yet, where the legacy is contingent, or given with a view to some other purpose, the rule of the court is different; and such legacies are not considered as a satisfaction. The inclination, however, is so strong against

§ 1111. The second class may be illustrated by reference to the case, where a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards in his lifetime, gives a portion, or makes a provision for the same child or grandchild, without expressing it to be in lieu of the legacy. In such a case, if the portion so received, or the provision so made, on marriage or otherwise, be equal to, or exceed, the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis*; then it will be deemed a satisfaction of the legacy, or, as it is more properly expressed, it will be held an ademption of the legacy.¹ If the

double portions, that it has been decided that, although no legacy is given by a will, yet, if by the intestacy of the parent, a distributive share of his personal or any real estate devolves upon the child, of equal or greater value than the portion, it shall be a satisfaction of the portion."

¹ *Bellasis v. Uthwatt*, 1 Atk. 427, Mr. Saunders's note; 1 Roper on Legacies, by White, ch. 6, p. 318 to 329; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, § 1 (a); *Copley v. Copley*, 1 P. Will. 146; *Ex parte Pye*, and *Ex parte Dubost*, 18 Ves. 140; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 526, 527; *Sparkes v. Cator*, 3 Ves. 535, 542; *Tolson v. Collins*, 4 Ves. 490, 491; *Stocken v. Stocken*, 4 Sim. 152; *Wallace v. Pomfret*, 11 Ves. 542; *Warren v. Warren*, 1 Bro. Ch. R. 305, Mr. Belt's note (1); *Trimmer v. Bayne*, 7 Ves. 515; *Ellison v. Cookson*, 2 Bro. Ch. R. 308, 309; *Pynn v. Lockyer*, 5 Mylne & Craig, 20; *Ante*, § 1105, and note; *Roberts v. Weatherford*, 10 Ala. 72; *Moore v. Hilton*, 12 Leigh, 1. Of course, the contrary is true, where the legacy is not certain, but contingent; where it is not *ejusdem generis*; and where it is stated to be for other objects. 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, § 1, note (a). The question may sometimes arise, who is properly deemed to stand *in loco parentis* to another. It was held by the Vice-Chancellor (Sir L. Shadwell), that no person can be deemed to stand *in loco parentis* to a child whose father is living, and who resides with and is maintained by the father, according to his means. He added, it may be very different, where the father, though living, does not maintain the child, and the latter does not live with him, but lives with the person assuming to stand *in loco parentis*. *Powys v. Mansfield*, 6 Sim. R. 528. But, upon an appeal to the Lord Chancellor (Lord Cottenham), this decree was reversed. On that occasion his lordship said: "No doubt the authorities leave in some obscurity the question, as to what is to be considered as meant by the expression, universally adopted, of one *in loco parentis*. Lord Eldon, however, in *Ex parte Pye*, has given to it a definition, which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says, it is a person "*meaning to put himself in loco parentis*; in the situation of the person described as the lawful father of the child." But this definition must, I conceive, be considered as applicable to those parental offices and duties, to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of

portion or provision be less than the amount of the legacy, it will at all events be deemed a satisfaction *pro tanto*;¹ and, if the dif-

a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. The relative situation of the friend and of the father may make this unnecessary, and the other benefits most essential. Sir William Grant's definition is, "A person assuming the parental character, or discharging parental duties"; which may seem not to differ much from Lord Eldon's definition, namely, the referring to the intention, rather than to the act of the party. The Vice-Chancellor says, it must be a person who has so acted towards the child, as that he has thereby imposed upon himself a moral obligation to provide for it; and that the designation will not hold, where the child has a father with whom it resides, and by whom it is maintained. This seems to infer, that the *locus parentis*, assumed by the stranger, must have reference to the pecuniary wants of the child, and that Lord Eldon's definition is to be so understood; and, so far, I agree with it. But I think the other circumstances required are not necessary to work out the principle of the rule, or to effectuate its object. The rule, both as applied to a father and to one *in loco parentis*, is founded upon the presumed intention. A father is supposed to intend to do what he is in duty bound to do, namely, to provide for his child according to his means. So one, who has assumed that part of the office of a father, is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it, affords a strong inference in favor of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither is conclusive. If, indeed, the Vice-Chancellor's definition were to be adopted, it would still be to be considered, whether, in this case, Sir John Barrington had not subjected himself to a moral obligation to provide for his brother's children, and whether such children can be said to have been maintained by their father. A rich, unmarried uncle, taking under his protection the family of a brother, who has not the means of adequately providing for them, and furnishing, through their father, to the children, the means of their maintenance and education, may surely be said to intend to put himself, for the purpose in question, *in loco parentis* to the children, although they never leave their father's roof. An uncle, so taking such a family under his care, will have all the feelings, intentions, and objects, as to providing for the children, which would influence him if they were orphans. For the purpose in question, namely, providing for them, the existence of the father can make no difference. If, then, it shall appear, from an examination of the evidence, that Sir John Barrington did afford to his brother the means of maintaining, educating, and bringing up his children according to their condition of life; and that the father had no means of his own, at all adequate to that purpose; that this assist-

¹ *Pym v. Lockyer*, 5 Mylne & Craig, 29; *Kirk v. Eddowes*, 3 Hare, 509; *Ante*, § 1105, and note.

ference between the amounts be slight, it may be deemed a complete satisfaction or ademption.¹ But if the difference be large and

ance was regular and systematic, and not confined to casual presents, the repetition of which could not be relied upon; that he held out to his brother and his family, that they were to look to him for their future provision, — it will surely follow, if that were material, that Sir John Barrington had so acted towards the children as to impose upon himself a moral obligation to provide for them, and that the children were in fact maintained by him, and not by their father. But it has been said, that Sir John Barrington would not have been guilty of any breach of moral-duty, if he had permitted the property to descend to his brother. Undoubtedly, he would not, because that would have been a very rational mode of providing for the children; but, if he had reason to suppose, that his brother would act so unnaturally as to leave the property away from his children, Sir John Barrington would have been guilty of a breach of moral duty towards the children, in leaving the property absolutely to their father. I should, therefore, feel great difficulty in coming to a conclusion, that Sir John Barrington had not placed himself *in loco parentis* to these children, if I thought everything necessary for that purpose, which the Vice-Chancellor has thought to be so. Adopting, however, as I do, the definition of Lord Eldon, I proceed to consider, whether Sir John Barrington did mean to put himself *in loco parentis* to the children, so far as related to their future provision. Parol evidence has been offered upon two points: first, to prove the affirmative of this proposition; secondly, to prove by declarations and acts of Sir John Barrington, that he intended the provision made by the settlement should be in substitution of that made by the will. That such evidence is admissible for the first of these purposes, appears to me necessarily to flow from the rule of presumption. If the acts of a party standing *in loco parentis* raise, in equity, a presumption, which could not arise from the same acts of another person, not standing in that situation, evidence must be admissible to prove or disprove the facts, upon which the presumption is depended, namely, whether, in the language of Lord Eldon, he had *meant* to put himself *in loco parentis*; and, as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose. And if the evidence establish the fact, that Sir John Barrington did mean to place himself *in loco parentis*, it will not be material to consider whether his declarations of intention, as to the particular provision in question, be admissible *per se*, because the presumption against the double portions, which in that case will arise, being attempted to be rebutted by parol testimony, may be supported by evidence of the same kind."

¹ *Ibid.*; *Platt v. Platt*, 3 Sim. 513; *Lord Durham v. Wharton*, 3 Cl. & Finn. 146; *Suisse v. Lord Lowther*, *The (English) Jurist*, April 1, 1843; S. C. 2 Hare, R. 424, 432, 438; 5 *Mylne & Craig*, 29. In this last case, Lord Cottenham said: "All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitution for, and not as an addition to, that first given; but, when the gift is a mere bounty, there

important, there, the presumption of an intention of substituting the portion for the legacy, will not be allowed to prevail.¹

is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts. The first question to be asked is, whether the sums given are to be considered as portions, or as mere gifts; and, upon this subject, certain rules have been laid down, all intended to ascertain and to work out the intention of the giver. In the case of a parent, a legacy to a child is presumed to be intended to be a portion; because providing for the child is a duty which the relative situation of the parties imposes upon the parent; but that duty, which is imposed upon a parent, may be assumed by another, who for any reason, thinks proper to place himself, in that respect, in the place of a parent; and, when that is so, the same presumption arises against his intending a first gift to take effect as well as a second; because both, in such cases, are considered to be portions. Whether the donor had, for this purpose, assumed the office of a parent, so as to invest his gift with the character of a portion, may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken; the question being, merely, whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child, and not merely to bestow a gift. Upon this point, *Powys v. Mansfield*, founded upon *Carver v. Bowles*, 2 Russ. & Mylne, 301, and many other cases, is conclusive. Such evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extreme circumstances; and as part of such extrinsic circumstances, the general conduct of the donor towards the family, and particularly towards the other children of it, may very properly be included in the consideration of his objects and intentions.

¹ See 1 Roper on Legacies, by White, ch. 6, § 1, p. 324; *Shudal v. Jekyll*, 2 Atk. 516, 519; *Debeze v. Mann*, 2 Bro. Ch. R. 164; S. C. 1 Cox, R. 346; *Trimmer v. Bayne*, 7 Ves. 515 to 518; *Ex parte Pye* 18 Ves. 140, 152 to 154; *Powys v. Mansfield*, 6 Sim. 528; *Weall v. Rice*, 2 Russ. & Mylne, 251, 267, 268; *Jones v. Morgan*, 2 Younge & Coll. 403, 412. In this case Lord Abinger said, he knew of no distinction as to this point, whether the portion was by a will or by a deed. In *Wharton v. Earl of Durham*, 3 Mylne & Keen, 479, Lord Brougham said: "It is equally certain, and flows equally from the same principles, that we are not to weigh in golden scales the provisions made, and to determine against ademption, merely because the two differ in amount, or even in kind. A difference of amount has never been held sufficient proof of accumulation; and it has been distinctly held, that the circumstance of the sums being payable at different times, and other indifferences, so they be slight, say the books, will not countervail the general presumption of an intention to adeem. The cases of *Ex parte Pye* and *Ex parte Dubost*, before Lord Eldon, *Hartopp v. Hartopp*, before Sir William Grant, and the discussion of the question raised on Sir Joseph Jekyll's will in favor of his niece, sufficiently illustrate this proposition. Nevertheless, no case has gone so far as to show, that a difference, such as the one in this case, will have no effect

§ 1112. The ground of this doctrine seems to be, that every such legacy is to be presumed as intended by the testator to be a portion for the child or grandchild, whether called so or not; and that, afterwards, if he advances the same sum upon the child's marriage, or on any other occasion, he does it to accomplish his original object, as a portion; and that, under such circumstances, it ought to be deemed an intended satisfaction or ademption of the legacy, rather than an intended double portion. And, where the sum advanced is less than the legacy, still it may fairly be presumed, that the testator, having acted merely in the discharge of a moral obligation, may, from a change of his own views, or of his own circumstances, be satisfied that the portion ought to be less.¹

upon the application of the principle; a difference no less than this, that the one portion would have gone to the issue of any marriage contracted by the child, while the other was confined to the offspring of a single bed. On the contrary, the cases, especially *Roome v. Roome*, *Baugh v. Read*, and *Spinks v. Robins*, show that differences not greater than this, perhaps less considerable, will suffice to exclude ademption. And one of those cases (*Baugh v. Read*), though ill reported, shows the impossibility of extending the principle of ademption to a legacy, where the provision subsequently made was expressed to be in satisfaction of a different claim. The child was entitled to £ 1,800 under her grandfather's will, and her father had left her a legacy of £ 8,000. By her settlement the husband covenanted to release the claim to her legacy of £ 1,800, in consideration of £ 5,000 portion given by the father, which was expressed to be in satisfaction of the grandfather's legacy. It is to be observed, that the question raised there, was not, whether this should operate as a total ademption of the £ 8,000 legacy given by the father's will, but only *pro tanto*. However, the court held it not even to be *pro tanto* an ademption; and yet, after satisfying the £ 1,800 of the grandfather's will, there remained upwards of £ 3,000 over to go in ademption of the father's legacy." [But this decision of Lord Brougham was reversed on appeal to the House of Lords. See 3 Cl. & Finn. 146; 10 Bligh, N. S. 526.]

¹ Ibid.; *Pym v. Lockyer*, 5 Mylne & Craig, R. 20, 34, 35. *Kirk v. Eddowes*, 3 Hare, 509. See the remarks of Lord Cottenham, quoted *ante*, § 1111, note. The reasoning of Mr. Vice-Chancellor Wigram, in *Suisse v. Lowther*, 2 Hare, R. 424, 434, 435, upon the same point, is important. He therè said: "The language of the court in those cases is, that it 'leans against double portions,'—a rule which, though sometimes called technical, Lord Cottenham, in *Pym v. Lockyer* (5 Mylne & Craig, 34, 46), said, was founded on good sense, and could not be disregarded without disappointing the intentions of donors. But, although the presumption is, that a parent does not give a child a double portion, it does not follow that every sum of money which a parent may give, even to a child, is intended as a portion. The court has never added up small sums, in order to show that, if the child claims those sums, as well as the larger provision made for him by the parent, he would be taking a double portion. The question, whether the sums given are to be taken as part of the child's portion or not, has often arisen; and

§ 1113. Now, to say the least of it, this is extremely artificial reasoning, and such as an ingenuous mind may find it difficult to follow. Lord Eldon has so characterized it. After admitting it to be the unquestionable doctrine of the court, that, where a parent

if the word 'portion,' or 'provision,' or any similar word, is used in the second gift, the court has said, the use of that term showed that the sum was given as a 'provision' or 'portion' for the child; and then it is sometimes regarded as a second portion, against which the court presumes. According to Lord Cottenham's decision in *Pym v. Lockyer* (for the first time deciding that point), it is taken to be a satisfaction *pro tanto*. The older cases rather incline to the proposition, that, if it were a portion, though less than the portion given by any former instrument, it was to be taken as satisfaction *in toto*. The reasoning, however, is, that the use of the word 'portion,' or 'provision,' or any similar word, shows that the testator meant to repeat his former gift, and then the rule applies. In the case of persons not being parent and child, but assumed to stand *in loco parentis*, the word 'portion,' or 'provision,' has been used for a different purpose. It has been used in order to show that the party intended to place himself in that situation, and to establish a quasi parental character; and, when that was done, the rule as to double portions has been applied. But, if there is a simple gift, and the donor has not acted towards the donee in a way to show that he has assumed a particular character, — a quasi parental situation, — in that case, it is nothing more than mere bounty to a stranger. I am not aware of any technical sense of the word 'provision,' upon which stress has been laid, except in the cases to which I have adverted. No question can arise on the effect of a gift in the nature of a portion, in any such sense, on these bequests of the Marquis to Suisse. In the doctrine with regard to double portions, some principles have, however, been laid down, which bear very strongly upon the case before me. The rule of presumption, as I before said, is against double portions as between parent and child; and the reason is this: a parent makes a certain provision for his children by his will, if they attain twenty-one, or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and, having come to that conclusion, as the result of general experience, the court acts upon it, and gives effect to the presumption, that a double portion was not intended. If, on the other hand, there is no such relation, either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason within the knowledge of the court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the court should assign any limit to that bounty, which is wholly arbitrary. The court, as between strangers, treats several gifts as, *primâ facie*, cumulative. The consequence is, as Lord Eldon observed (18 Ves. 147), that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child; for the advancement in the case of the natural child is not, *primâ facie*, an ademption.

gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving it as a portion, he has strongly remarked: "And, by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling, upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part. And, in some cases, it has gone a length consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances, upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and although, at the time of making the will, he thought he could not discharge that debt with less than £10,000, yet, by a change of his circumstances and of his sentiments upon moral obligation, it may be satisfied by the advance of a portion of £5,000."¹ In addition to this strong language, it may be added, that courts of equity make out this sort of doctrine, not upon any clear intention of the testator anywhere expressed by him, but they first create the intention, and then make the parent suggest all the morals and equities of the case, upon their own artificial modes of reasoning, of which it is not too much to say, that scarcely any testator could ever have dreamed.²

¹ *Ex parte Pye* and *Ex parte Dubost*, 18 Ves. 151. It is not a little remarkable, that the Lord Chancellor, in *Hartop v. Whitmore* (1 P. Will. 682), should have said: "If a father gives a daughter a portion by his will, and afterwards gives to the same daughter a portion in marriage, this *by the laws of all other nations*, as well as of Great Britain, is a revocation of the portion given by the will; for it will not be intended, unless proved, that the father designed two portions to one child." We should be glad to know where the learned Chancellor found such a rule recognized by all nations. See, also, *Weall v. Rice*, 2 Russ. & Mylne, 251, 267; *Ante*, § 1110, note.

² Lord Thurlow, in *Grave v. Salisbury* (1 Bro. Ch. R. 425, 426), spoke in express disapprobation of the doctrine. "The court," said he, "has, however, certainly presumed against double portions; and, although it has encouraged that conjecture with a degree of sharpness, I cannot quite reconcile myself to it; whenever an express provision is made directly, or as a portion, by a parent or person *in loco parentis*, I will not displace the rule laid down by wiser men, that it shall be a satisfaction, however reluctant I may be to follow it." On the other hand, Sir John Leach, in *Weall v. Rice*, 2 Russ. & Mylne, R. 251, 267, thought the rule

§ 1114. It has been supposed, that the origin of this particular doctrine is to be found in the civil law, and that it was transferred from hence into the equity jurisprudence of England.¹ But Lord Thurlow has expressed a doubt, whether the doctrine of the civil law proceeds so far, and whether it is there taken up on the idea of a debt, or is not rather considered as a presumption, repellable by evidence.² The language attributed to his lordship on this occasion seems not exactly to express his true meaning; for, in the equity jurisprudence of England, the presumption may be rebutted by evidence.³ His meaning probably was, that the matter was

right; and Lord Brougham, in *Wharton v. The Earl of Durham*, 3 Mylne & Keen, 478, expressed a similar opinion. He said: "That the presumption of law is against double portions, no one questions, any more than that the rule is founded on good sense. For the parent, being only bound, by a duty of imperfect obligation, to make provision for the child, and being the sole judge of what that provision shall be, must, generally speaking, be supposed, when he makes a second arrangement by settlement or otherwise, to put it in the stead of a former one made by will, and not to do that twice over, which no law could compel him to do once. Nevertheless, as has oftentimes happened with legal principles, there has been a tendency to push the presumption, once established beyond the bounds, which the principle it was founded upon would reasonably warrant; and, because the doctrine was sound, that a second provision should be taken as substitutionary for a former one, it seems to have been almost concluded that it never could be accumulative. At least, the leaning of the courts has frequently gone so far as to make violent presumptions against the conclusions to be plainly drawn from facts indicating an intention, which excluded the general supposition of ademption; and observations have been more than once made in this place, indicating the opinion of the court, that the principle had been pressed quite far enough, and ought to receive no more extension. The rule, then, as it now stands, must be taken to be this: the second provision will be held to adeem the first, — say the marriage portion to adeem the legacy, — unless, from the circumstances of the case, an intention appears, that the child, or other person, towards whom the testator has placed himself *in loco parentis*, shall take both; and there is to be no leaning, still less any straining, against inferring such an intention from circumstances, any more in this than in any other case." The case of *Wharton v. The Earl of Durham* was reversed in the House of Lords (3 Cl. & Finn. 146; 10 Bligh, R. 526), but it left the general principle untouched. See, also, *Pym v. Lockyer*, 5 Mylne & Craig, R. 24, 34, 35, and *Suisse v. Lord Lowther*, 2 Hare, R. 424, 434, 435; *Kirk v. Eddowes*, 3 Hare, 509; *Ante*, § 112, and note.

¹ See *Ante*, § 1108.

² *Grave v. Salisbury*, 1 Bro. Ch. R. 427.

³ *Fonbl. Eq. B. 4*, Pt. 2, ch. 1, note (a); *Debeze v. Mann*, 2 Bro. Ch. R. 165, 519; *S. C.* 1 Cox, R. 346; *Shudall v. Jekyll*, 2 Atk. 512; *Trimmer v. Bayne*, 7 Ves. 515 to 518; 1 *Roper on Legacies*, by White, ch. 6, § 2, p. 338 to 353; *Ellison v. Cookson*, 2 Bro. Ch. R. 252, 307; *S. C.* 3 Bro. Ch. R. 60; 1 Ves. Jr. 100; 2 Cox, R. 220; *Guy v. Sharpe*, 1 Mylne & Keen, 589.

a mere matter of presumption, arising from the whole circumstances of the will; and that there was no such rule in the civil law, as that in English jurisprudence, namely, that, *primâ facie*, such a portion, subsequently given, was an ademption of the legacy. No one can doubt, that, in many cases, such a presumption may arise from the circumstances. As, for example, in a case put in the civil law. A father by his will devised certain lands to his daughter, and afterwards gave the same lands to her as a marriage portion. It was held to be an ademption of the devise. *Filia legatorum non habet actionem, si ea, quæ ei in testamento reliquit, vivus pater postea in dotem dederit.*¹ So, it was held in the same law, to be a revocation of the legacy of a debt, if it was afterwards collected of the debtor by the testator in his lifetime. The like rule was applied, where, after the devise of specific property, the testator alienated in his lifetime.² *Testator supervivens, si eam rem, quam reliquerat, vendiderit, extinguitur fideicommissum.*³ These cases are so obvious, as necessary and intentional adempments of the legacies, that they require no artificial rules of interpretation to expound the intent. And yet the civil law was so far from favoring adempments, that, even in these cases, it admitted proof that the testator did not intend to adeem the legacy; the rule being, *Si rem suam legaverit testator, posteaque eam alienaverit; si non adimendi animo vendidit, nihilominus deberi.*⁴ And again; *Si rem suam testator legaverit eamque necessitate urgente alienaverit, fideicommissum peti posse, nisi probetur, adimere ei testatorem voluisse. Probationem autem mutatæ voluntatis ab hæredibus exigendam.*⁵ These cases are sufficient to show, how widely variant the doctrine on this subject is in the civil law from that which now prevails in equity.⁶

¹ Cod. Lib. 6, tit. 37, l. 11; 2 Domat, B. 4, tit. 2, § 11, art. 11.

² Domat, B. 4, tit. 2, § 11, art. 12 to 14, 22.

³ Id. § 11, art. 13, note; Pothier, Pand. Lib. 34, tit. 4, n. 8, 9.

⁴ Inst. Lib. 2, tit. 20, § 12; Id. § 10, 11.

⁵ Dig. Lib. 32, tit. 3, l. 11, § 12; Pothier, Pand. Lib. 34, tit. 4, n. 8.

⁶ See Pothier, Pand. Lib. 34, tit. 4, n. 8 to 10. Many cases like these have been adjudged precisely in the same way in equity jurisprudence, as they were in the civil law. Thus, an alienation by the testator in his lifetime, of the subject-matter of a legacy of the same thing. *Hambling v. Lister*, Ambler, R. 402. So, the receipt or recovery of a debt, due by the legatee, which had been bequeathed to him, is an ademption of a legacy of the same debt. *Rider v. Wager*, 2 P. Will. 330; 2 Madd. Ch. Pr. 74 to 78; 1 Roper on Legacies, by White, ch. 5, § 1, p. 286 to 313.

§ 1115. There are, however, in equity jurisprudence, certain established exceptions to this doctrine of constructive satisfaction, or ademption of legacies, which deserve particular notice. In the first place, it does not apply to the case of a devisee of a mere residue; for it has been said, that a residue is always changing. It may amount to something or be nothing; and therefore no fair presumption can arise of its being an intended satisfaction or ademption.¹ [But in a late important case in the House of Lords, it has been held, after a full review of all the authorities, that the bequest of a residue will, according to its amount, be a satisfaction of a portion, either in full, or *pro tanto*, and the earlier cases to the contrary were not approved.²]

[* § 1115 a. In a late case before the Lord Chancellor, and the

¹ *Watson v. The Earl of Lincoln*, Ambler, R. 327; *Farnham v. Phillips*, 2 Atk. 216; *Smith v. Strong*, 4 Bro. Ch. R. 493; *Davys v. Boucher*, 3 Y. & C. Exch. 397; *Freemantle v. Bankes*, 5 Ves. 79. — It was said by Lord Hardwicke, in *Farnham v. Phillips* (2 Atk. 216), that there is no case, where the devise has been of a residue (for that is uncertain, and, at the time of the testator's death, may be more or less), in which a subsequent portion given has been held to be an ademption of a legacy. This seems now, accordingly, to be the established construction. *Smith v. Strong*, 4 Bro. Ch. R. 493; *Watson v. Earl of Lincoln*, Ambler, R. 325, and Mr. Blunt's note (1) to (5); *Freemantle v. Bankes*, 5 Ves. 79; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, § 1, note (a). Is there, in this respect, any difference between the gift of a residue, as an ademption of a legacy, and the gift of a residue, as an advancement or satisfaction *pro tanto*, of a portion secured by a marriage settlement? In *Devese v. Pontet*, 1 Cox, R. 188, S. C. Prec. in Ch. by Finch, 240, note, it was held, that bequest of a residue was not any satisfaction of a pecuniary marriage-portion, even though there was, in the same will, a bequest of specific personal property to the party, exceeding the stipulated portion. See also *Bengough v. Walker*, 15 Ves. 513, 514; 1 Roper on Legacies, by White, ch. 6, § 1, p. 226; *Ackworth v. Ackworth*, 1 Bro. Ch. 307, note. How would it be in the case of a settlement, stipulating for a portion, and that if any advancement should be made in the lifetime of the parent, it should be a part satisfaction, unless expressly declared in writing to the contrary; and then a legacy of a residue to the party entitled to such a portion? Would it be a satisfaction or not? See 2 Roper on Legacies, by White, ch. 18, § 3, p. 95, &c.; *Ante*, § 1110, and note (1). In the case of a portion secured by settlement, a distributive share, in a case of intestacy, to the full amount of the portion, will be deemed a satisfaction. *Ante*, § 1110, and note; *Moulson v. Moulson*, 1 Bro. Ch. R. 82; 2 Roper on Legacies, by White, ch. 18, § 4, p. 105 to 108. But it will not be deemed a satisfaction of a clause in a marriage settlement, respecting an advancement *in the lifetime of the settler*. *Ante*, § 1109, and note; 2 Roper on Legacies, by White, ch. 18, § 4, p. 105 to 108; *Garthshore v. Chalie*, 10 Ves. 15.

² *Lady Thynne v. Earl of Glengall*, 2 House of Lords' Cases, 131; 12 Jur. 805.

Lords Justices, the cases upon the question discussed in the preceding section is considered, and the cases reviewed, and the rule declared to be one of intention, whether, and how far, a residue shall be taken as adeemed by subsequent portions given, or settled, and that it should not depend upon the mere uncertainty of the residue, or upon slight differences between the trusts of the residue, and the trusts of the settlement.¹ The same rule is applied to all questions of ademption.²]

§ 1116. Another exception to this doctrine of constructive ademption of legacies, may be gathered from the qualification already annexed to the enunciation of it in the preceding pages. It is there limited to the case of a parent, or of a person standing *in loco parentis*.³ In relation to parents, it is applicable only to legitimate children; and in relation to persons, standing *in loco parentis*, it is also applicable generally to legitimate children only, unless the party has voluntarily placed himself *in loco parentis* to a legatee, not standing either naturally or judicially in that predicament. All other persons are, in contemplation of law, treated as strangers to the testator.⁴

§ 1117. But this doctrine of the constructive ademption of legacies has never been applied to legacies to mere strangers,⁵ unless under very peculiar circumstances, such as where the legacy is given for a particular purpose, and the portion is afterwards, in the lifetime of the party, given exactly for the same purpose, and for none other.⁶ Except in cases standing upon such peculiar circumstances, and which, therefore, seem to present a very cogent presumption of an intentional ademption, the rule prevails, that a legacy to a stranger, legitimate or illegitimate, is not adeemed by a subsequent portion or advancement in the lifetime of the testa-

¹ [* *Montefiore v. Guedalla*, 6 Jur. N. S. 329.

² *Sims v. Sims*, 2 Stockton, Ch. R. 158.]

³ It has been applied to an uncle. *Gill's Estate*, 1 Parsons, Eq. R. 139. To a brother. *Richards v. Humphreys*, 15 Pick. 133.

⁴ See *Ante*, § 1111, note (1), and *Powys v. Mansfield*, 6 Sim. 528; S. C. 3 Mylne & Craig, R. 359; *Pym v. Lockyer*, 5 Mylne & Craig, 29, 34, 35, 46; *Suisse v. Lowther*, 2 Hare, R. 424, 434, 435; *Ante*, § 1113, and note.

⁵ 1 Roper on Legacies, by White, ch. 6, § 2, p. 329; *Pym v. Lockyer*, 5 Mylne & Craig, 24, 34, 35, 46; *Suisse v. Lowther*, 2 Hare, R. 424, 434, 435. See the remarks of Mr. Vice-Chancellor Wigram, cited *Ante*, § 1112, note.

⁶ *Debeze v. Mann*, 2 Bro. Ch. R. 165, 519, 521; S. C. 1 Cox, 346; *Monck v. Lord Monck*, 1 B. & Beatt. 303; *Rosewell v. Bennett*, 3 Atk. 77; *Roome v. Roome*, 3 Atk. 181.

tor, without some expression of such intent manifested in the instrument, or by some writing accompanying the portion or advancement.¹

§ 1118. The reason commonly assigned for this doctrine is, that, as there is no such obligation upon such a testator to provide for the legatee, as subsists between a parent and child, no inference can arise, that the testator intended, by the subsequent gift or advancement, to perform any such duty *in præsentis*, instead of performing it at his death; and there is no reason why a person may not be entitled to as many gifts as another may choose to bestow upon him.² That this reasoning is extremely unsatisfactory, as well as artificial, may be unhesitatingly pronounced. It leads to this extraordinary conclusion, that a testator, in intendment of law, means to be more bountiful to strangers than to his own children; that, by a legacy to his children, he means not to gratify his feelings or affections, but merely to perform his duty; but that, by a legacy to strangers, he means to gratify his feelings, affections, or caprices, without the slightest reference to his duty. What makes the doctrine still more difficult to be supported upon any general reasoning is, that grandchildren, brothers, sisters, uncles, aunts, nephews, and nieces, as well as natural children, are deemed strangers to the testator in the sense of the rule (unless he has placed himself towards them *in loco parentis*); and that they are in a better condition, not only than legitimate children, but even than they would be if the testator formerly acted *in loco parentis*.³ Considerations and consequences like these may well induce us to pause upon the original propriety of the doctrine. It is, however, so generally established, that it cannot be shaken, but by overthrowing a mass of authority, which no judge would feel himself at liberty to disregard.⁴

¹ Roper on Legacies, by White, ch. 6, § 2, p. 331 to 336; *Shudall v. Jekyll*, 2 Atk. 516; *Powell v. Cleaver*, 2 Bro. Ch. R. 500; *Ex parte Dubost*, 18 Ves. 152, 153; *Whetherby v. Dixon*, Cooper, Eq. R. 279; *Grave v. Lord Salisbury*, 1 Bro. Ch. R. 425; 18 Ves. 152; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 1, note (a).

² 1 Roper on Legacies, by White, ch. 6, § 2, p. 331, 333; *Pym v. Lockyer*, 5 Mylne & Craig, 29, 34, 35; *Ante*, § 1112, and note; *Suisse v. Lowther*, 2 Hare, R. 424, 434, 435.

³ *Ibid.*; *Ex parte Dubost*, 18 Ves. 152, 153; *Ante*, § 1111, and note (1), as to who is to be deemed to stand *in loco parentis*. See also *Powys v. Mansfield*, 6 Sim. R. 528; *S. C.* 3 Mylne & Craig, R. 359; *Booker v. Allen*, 2 Russ. & My. 270.

⁴ Questions of another nature often arise, as to what constitutes an advance-

§ 1119. The third and last class of cases to which we have alluded, as connected with the doctrine of satisfaction, is, where a legacy is given to a creditor. And here, the general rule is, that where the legacy is equal to, or greater in amount than an existing debt, where it is of the same nature; where it is certain, and not contingent; and where no particular motive is assigned for the gift; in all such cases the legacy is deemed a satisfaction of the debt.¹ The ground of this doctrine is, that a testator shall be presumed to be just before he is kind or generous. And, therefore, although a legacy is generally to be taken as a gift, yet, when it is to a creditor, it ought to be deemed to be an act of justice, and not of bounty, in the absence of all countervailing circumstances, according to the maxim of the civil law, *debitor non præsumitur donare*.²

§ 1120. Some of the observations which have been already made, apply, although with diminished force, to this class of cases. For, where a man has assets, sufficient both for justice and generosity, and where the language of the instrument imports a donation, and not a payment, it seems difficult to say why the ordinary meaning of the words should not prevail.³ Where the sum is precisely the same with the debt, it may be admitted, that there arises some presumption, and, under many circumstances, it may be a cogent presumption of an intention to pay the debt. But, where the legacy is greater than the debt, the same force of presumption certainly does not exist; and, if it is less than the debt, then (as we shall presently see), the presumption is admitted to be gone.

§ 1121. It is highly probable that this doctrine was derived from the civil law, where it is clearly laid down, but with limitations and qualifications in some respects different from those which are recognized in equity jurisprudence.⁴ Where the debt was abso-

ment of a child, within the meaning of that term in the statute of distributions (22d and 23d Charles II., ch. 10). The principal cases on the subject will be found collected in 1 Madd. Ch. Pr. 507, 516.

¹ 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (l); Talbott v. Duke of Shrewsbury, Prec. Ch. 394; Ward v. Coffield, 1 Dev. Eq. 108; Jeffs v. Wood, 2 P. Will. 131, 132.

² Ibid.; Rawlins v. Powell, 1 P. Will. 229. See the distinction between cases of debts paid in full before and after the will, 3 Hare, R. 281, 298.

³ See Chauncey's case, 1 P. Will. 410, and Mr. Cox's note (1); Fowler v. Fowler, 3 P. Will. 354.

⁴ Pothier, Pand. Lib. 34, tit. 3, n. 30 to 34.

lutely due, and for the same precise sum, a legacy to the same amount was deemed a satisfaction of it. But, if there was a difference even in the time of payment, between the debt and the legacy, the latter was not a satisfaction. *Sin autem, neque modo, neque tempore, neque conditione, neque loco, debitum differatur, inutile est legatum.*¹ And so, if the legacy was more than the debt, it seems that it was not a satisfaction. *Quotiens debitor creditori suo legaret, ita inutile esse legatum, si nihil interesset creditoris ex testamento potius agere, quam ex pristina obligatione.*²

§ 1122. But, although the rule, as to a legacy being an ademption of a debt, is now well established in equity,³ yet it is deemed to have so little of a solid foundation, either in general reasoning, or as a just interpretation of the intention of the testator, that slight circumstances have been laid hold of to escape from it, and to create exceptions to it.⁴ The rule, therefore, is not allowed to prevail, where the legacy is of less amount than the debt, even as a satisfaction *pro tanto*; nor where there is a difference in the times of payment of the debt and of the legacy;⁵ nor where they are of a different nature as to the subject-matter or as to the interest therein;⁶ nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to the will; nor where the legacy is contingent or uncertain;⁷ nor where there is an express direction in the will for the payment of debts,⁸ nor where the bequest is of a residue;⁹ nor where the debt is a negotiable security;¹⁰ [nor where the legacy is given to the creditor's wife;]¹¹ nor where the debt is upon an open and running ac-

¹ Pothier, Pand. Lib. 34, tit. 3, n. 31; Dig. Lib. 30 (Lib. prim. de Leg.), tit. 1, l. 29; Inst. Lib. 2, tit. 20, § 14.

² Pothier, Pand. Lib. 34, tit. 3, n. 33.

³ See *Eaton v. Barton*, 2 Hill, 576; *Fitch v. Peckham*, 16 Verm. 150.

⁴ See *Goodfellow v. Burchett*, 2 Vern. 298, and Mr. Raithby's note; *Chauncey's case*, 1 P. Will. 410, Mr. Cox's note (1); *Nichols v. Judkin*, 2 Atk. 301; *Richardson v. Greese*, 3 Atk. 68; *Hales v. Darrell*, 3 Beavan, 324; *Edelen v. Dent*, 2 Gill. & Johns. 185; 2 Roper on Legacies, by White, ch. 17, p. 28 to 67; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (l); *Bell v. Coleman*, 5 Madd. R. 22.

⁵ *Van Riper v. Van Riper*, 1 Green's Ch. 1.

⁶ *Cloud v. Clinkenbeard*, 8 B. Monroe, 397.

⁷ *Dey v. Williams*, 2 Dev. & Batt. Eq. R. 66.

⁸ *Strong v. Williams*, 12 Mass. 391.

⁹ *Barrett v. Beckford*, 1 Ves. 519; *Devese v. Pontet*, 1 Cox, 188; S. C. Prec. Ch. by Finch, 240, note.

¹⁰ *Carr v. Eastabrooke*, 3 Ves. 564.

¹¹ *Hall v. Hill*, 1 Dru. & War. 94; *Mulheran v. Gillespie*, 12 Wend. 349.

count.¹ And as to a debt, strictly so called, there is no difference, whether it is a debt due to a stranger or to a child.²

§ 1123. On the other hand, where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, courts of equity will not deem the legacy as either necessarily or *primâ facie* evidence of an intention to release or extinguish the debt; but they will require some evidence, either on the face of the will, or *aliunde*, to establish such an intention.³

§ 1123 *a*. Closely allied to the subject of election and satisfaction in cases of legacies, is the doctrine as to what is called the cumulation of legacies, or when and under what circumstances legacies given by different instruments or wills are to be deemed cumulative or not. The general rule here is, that where legacies are given by different instruments, the presumption is, *primâ facie*, that two legacies are intended, and that the last is not a mere repetition of the former; nor will the fact that each legacy is for the same amount in money operate to repel the presumption that they are cumulative, unless indeed there are other circumstances to repel it. As, for example, if the testator connects a motive with both, and that motive is the same, the double coincidence will induce the court to believe that repetition and not accumulation is intended. *A fortiori*, where each instrument gives precisely the same thing, as a horse, or a coach, or a particular diamond ring; or the language shows by express declaration or natural implication, that the testator intends a mere repetition, the presumption of accumulation is completely repelled.⁴

¹ Rawlins *v.* Powell, 1 P. Will. 229.

² Tolson *v.* Collins, 4 Ves. 483. The principal cases on this subject will be found collected in 2 Roper on Legacies, by White, ch. 17, p. 28 to 67; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); Goodfellow *v.* Burchett, 2 Vern. 298, Mr. Raithby's note; Chauncey's case, 1 P. Will. 410, Mr. Cox's note; 2 Madd. Ch. Pr. 33 to 49; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 114 to 116.

³ 2 Roper on Legacies, by White, ch. 17, p. 28; *Id.* § 4, p. 61 to 66.

⁴ Hooley *v.* Hatton, 1 Bro. Ch. R. 390, note; Hemming *v.* Clutterbuck, 1 Bligh, N. S. 479; Hurst *v.* Beach, 5 Madd. R. 358; Suisse *v.* Lowther, 2 Hare, R. 432. In this last case, Mr. Vice-Chancellor Wigram said: "On questions of repetition or accumulation, most of the judges have referred, as Lord Eldon did, in the case of Hemming *v.* Gurrey (2 Sim. & Stu. 311; 1 Bligh, N. S. 479; S. C. nom. Hemming *v.* Clutterbuck), to the judgment in Hooley *v.* Hatton (1 Bro. C. C. 390, n.), as containing a sound exposition of the law upon the subject,—and in the case of Hurst *v.* Beach (5 Madd. 358), Sir. John Leach drew his conclusion from the cases with great precision, and, as it appears to me, with great accuracy; he stated

[* § 1123 b. In a recent case¹ the question arose, how far the provisions of an English will shall be considered presumptively in satisfaction of the provisions for the same persons, the testator's grandchildren, under a Scottish settlement, there being in the Scottish law no presumption against double portions. It was held that in regard to the instrument last in date, it being of English character, its effect and operation must be determined by the English law, and being of a character to operate in satisfaction of the provisions under the settlement, by the English law, it will have the same effect as to the Scottish settlement.]

the rule to be, that, where legacies are given by different instruments, the presumption is, *primâ facie*, that two legacies are intended. But, inasmuch as if a testator were by one instrument to give a particular ring, or horse, or specific chattel, and were, by another instrument, to give precisely the same thing, it would follow that the second must be a repetition, — so, if the bounty given by one instrument be, in terms, a repetition of that which has gone before, the court has presumed that the second was intended to be repetition and not accumulation. It is clearly decided, however, that the mere fact that the amount is the same, is not such an identification of the second with the first as would prevent both from taking effect as cumulative; but if, in addition to the amounts being the same, the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the court to believe that repetition, and not accumulation, was intended. Except in such cases, and the class of cases to which I am about to advert, the court does not infer that repetition was the object, unless it be so declared, or it is to be collected from the words of the will itself. The presumption, in the case of several gifts by different instruments, being in favor of accumulation, it is clear that the claim of the plaintiff in this case must be strengthened by any circumstances of difference between the two gifts, — whether it be found in the amount, — in the character in which it is given, — in the mode of employment, — in the extent of the interest, — or in the motive for the bounty. All these considerations tend, in the judgment of the court, to support the argument in favor of accumulation. Now, in the legacy to Suisse, by the last codicil, there is a particular description of Suisse, which imports a motive of a later date than the former legacies; he is described as “an excellent man,” and the amount being different and less beneficial to Suisse than the amount of the previous gifts to him, this adds to the presumption already in his favor, that a distinct gift was intended; and the only question, therefore, is, whether there is anything in the word “provide,” as used in the last codicil, which should lead the court to the construction that the legacy is not cumulative.

¹ [* *Campbell v. Campbell*, 12 Jur. N. S. 118; as to substitutionary, gifts see *Re Merrick's Trusts*, 12 Jur. N. S. 245.]

CHAPTER XXXI.

APPLICATION OF PURCHASE-MONEY.

[* § 1124. The purchaser bound to see to the application of the purchase-money in case of trust.

§ 1125. This rule not universal.

§ 1126. Real estate now liable for the payment of all debts.

§ 1127. Where trust is specific, purchaser must see to application of purchase-money.

§ 1127 *a.* But not where it is general and indefinite.

§ 1128. Rule does not apply to personal estate.

§ 1129. Will make no difference that part of personalty is specifically bequeathed.

§ 1130. Rule does not apply to real estate devised for payment of debts generally.

§ 1131. Form of the charge not important.

§ 1131 *a.* But if purchaser is knowing to a breach of trust, he is liable.

§ 1132. So rule applies to real estate charged with particular debts or legacies.

§ 1132 *a.* The rule does not apply where the testator reposes the trust of applying the money in the trustee.

§ 1133. Difference between a charge, before, and after the time of sale.

§ 1134. Rule does not apply where discretion is to be exercised by trustee.

§ 1135. The rule an embarrassing one.]

§ 1124. It is in cases of trusts under wills also, that questions often arise, as to the payment of purchase-money to the trustees, and as to the cases in which the purchaser is bound to look to the due application of purchase-money. This subject, therefore, although it may equally apply to other cases of trusts, created *inter vivos*, may be conveniently treated in this place. It has been remarked by a very learned writer, that courts of equity have in part remedied the mischiefs (if they can be deemed mischiefs) arising from the admission of trusts, with respect to the *cestui que trust* or beneficiary, by making persons, paying money to the trustee, with notice of the trust, answerable in some cases for the proper application of it to the purposes of the trust. But at the same time, he thinks it questionable, whether the admission of the doctrine is not, in general, productive of more inconvenience than real good; for, although in many instances, it is of great service to the *cestui que trust*, as it preserves his property from peculation and other disasters, to which, if it were left to the mere discretion of the trustee, it would necessarily be subject; yet, on the other hand, it creates great embarrassments to purchasers in many cases; and especially, where, as in cases of infancy, the parties in interest are

incapable of giving a valid assent to the receipt and application of the purchase-money by the trustee.¹

§ 1125. The doctrine is not universally true, that a purchaser, having notice of a trust, is bound to see that the trust is in all cases properly executed by the trustee. As applied to the cases of sales, authorized to be made by trustees for particular purposes (which is the subject of our present inquiries), the doctrine is not absolute, that the purchaser is bound to see that the money raised by the sale is applied to the very purposes indicated by the trust. On the contrary, there are many qualifications and limitations of the doctrine in its actual application to sales both of personal and of real estate.

§ 1126. The best method of ascertaining the true nature and extent of these qualifications and limitations will be by a separate consideration of them, as applied to each kind of estate, since the rules which govern them are, in some respects, dissimilar, owing to the greater power which a testator has over his real, than he has over his personal, estate.² In regard to real estate, it is well known, that, at the common law, it was not bound, even for the specialty debts of the testator, except in the hands of his heir; although, by a statute in England (3 W. & M. ch. 14) it is made liable for such debts in the hands of his devisee. But, until a very recent period, the real estate of deceased persons was not liable for the payment of simple contract debts. The statute of 3d and 4th William IV., ch. 104, has made all such real estate liable, as assets in equity, for the payment of all their debts,

¹ Mr. Butler's note to Co. Litt. 290 b, note (1), § 12; in *Belfour v. Welland*, 16 Ves. 156, Sir William Grant expressed his dissatisfaction with the doctrine, in the following terms: "The objection is, that, if they misemploy the price, the purchaser may be called upon to pay the money over again; in other words, that the purchaser is bound to see to the application of the purchase-money. I think the doctrine upon that point has been carried further than any sound equitable principle will warrant. Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act, tending to defeat the trust, of which they have notice. But, where the sale is made by the trustee, in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase-money." See also Mr. Sugden's Remarks, *Sugden on Vendors*, ch. 11; § 1, p. 515, 523 to 531, 7th edition. *Id.* 9th edit. ch. 11, vol. 2, p. 30 to 56.

² *Sugden on Vendors*, ch. 11, p. 515, 7th edit.; *Id.* 9th edit. vol. 2, ch. 1, p. 30.

whether due on simple contract or by specialty.¹ In America, the law has been generally altered; and such real estate is made liable to the payment of all debts, as auxiliary to the personal assets. But, as to personal estate, it was at the common law, and still remains, in both countries, directly liable to the payment of all debts; or, as it is commonly expressed, it goes to the executors, as assets for creditors, to be applied in a due course of administration.² It is, therefore, in a strict sense, a trust fund for the payment of debts generally.³

§ 1127. The general principle of courts of equity in regard to the duty of purchasers (not especially exempted by any provision of the author of the trust), in cases of sales of property, or charges on property under trusts (for there is no difference, in point of law, between sales and charges), to see to the application of the purchase-money, is this; that, wherever the trust or charge is of a defined and limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but, wherever the trust is of a general and unlimited nature, he need not see to it.⁴ Thus, for example, if a trust is

¹ Williams's Law of Executors and Administrators, Pt. 4, B. 1, ch. 2, § 1, p. 1204 (2d edit. 1838).

² Sugden on Vendors, ch. 11, p. 515, 7th edit.; Id. 9th edit. vol. 2, ch. 11, p. 3.

³ Ibid.

⁴ 1 Madd. Ch. Pr. 352, 496; 2 Madd. Ch. Pr. 103; 1 Powell on Mortgages, ch. 9, p. 214 to 250, Coventry & Rand's edit. *St. Mary's Church v. Stockton*, 4 Halst. Ch. R. 520; *Duffy v. Calvert*, 6 Gill, 487. In *Elliott v. Merryman*, Barnard. Ch. R. 78 (cited and approved in *Shaw v. Borrer*, 1 Keen R. 574), the Master of the Rolls said: "The general rule is, that, if a trust directs that land should be sold for payment of debts generally, the purchaser is not bound to see that the money be rightly applied. If the trust directs that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for payment of those debts. The present case, indeed, does not fall within either of these rules, because here lands are not given to be sold for the payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference, and his honor was of opinion that it did not. And, if such a distinction was to be made, the consequence would be, that, whenever lands are charged with the payment of debts generally, they never could be discharged of that trust, without a suit in this court, which would be extremely inconvenient. No instances have been produced, to show that, in any other respect, the charging land with the payment of debts differs from the directing them to be sold for such a purpose; and, therefore, there is no reason, that a difference should be established in this respect. The only objection, that seemed to be of weight with

created to sell for the payment of a portion, or of a mortgage, there, the purchaser must see to the application of the purchase-money to that specified object. If, on the other hand, a trust is created, or a devise is made, or a charge is established, by a party for the payment of debts generally, the purchaser is exempted from any such obligation.¹

§ 1127 *a*. Upon this ground, where a testator, by his will, charged his real estate with the payment of debts generally, and afterwards devised his real estate to a trustee upon certain trusts for other persons, it was held, that the trustee had a right to sell or mortgage the estate so charged for the payment of the debts; and that, upon such sale or mortgage, the purchaser or mortgagee was not bound to look to the application of the purchase or mortgage money.²

§ 1128. Leasehold estates are equally, with personal chattels, subject to the payment of debts. And here the rule is, that the personal estate being liable for the payment of the debts of the testator generally, the purchaser of the whole, or any part of it, is not, upon the principle already stated, bound to see that the purchase money is applied by the executor to the discharge of the debts; for the trust is general and unlimited, it being for the payment of all debts. It is true, that there is an apparent exception to the rule; and that is, that he must be a *bonâ fide* purchaser, without notice, that there are no debts; and he must not collude regard to this matter is, that, where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but, where they are only charged with the payment of debts, it may be said, that the trust is not performed till these debts are discharged. And so far, indeed, it is true, that where lands are charged with the payment of annuities those lands will be charged in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction." See also *Shaw v. Borrer*, 1 Keen, R. 559, 575, 576; *Post*, § 1131; *Wood v. White*, 4 Mylne & Craig, 460, 481, 482.

¹ *Elliot v. Merryman*, Barnard, Ch. R. 78; S. C. 2 Atk. 42, cited and approved in *Shaw v. Borrer*, 1 Keen, R. 573, 574; *Walker v. Smallwood*, Ambler, R. 676; *Bonney v. Ridgard*, 1 Cox, R. 145; *Jenkins v. Hiles*, 6 Ves. 654; *Braithwaite v. Britain*, 1 Keen, R. 206, 222. See 1 *White & Tudor's Eq. Leading Cases*, 40, and notes.

² *Ball v. Harris*, 4 Mylne & Craig, R. 264; *Eland v. Eland*, 4 Mylne & Craig, R. 420; *Post*, § 1131, note.

with the executor in any wilful misapplication of the assets.¹ But this proceeds upon the ground of fraud, which is of itself sufficient to vacate any transaction whatsoever.

§ 1129. It will not make any difference in the application of this general doctrine as to the personal estate, that the testator has directed his real estate to be sold for the payment of his debts, whether he specifies the debts or not; or that he has made a specific bequest of a part of his personal estate for a particular purpose, or to a particular person, although such specific bequest is known to the purchaser, if he has no reason to suspect any fraudulent purpose.² The ground of this doctrine is, that, otherwise, it would be indispensable for a person, before he could become the purchaser of any personal estate, specifically bequeathed, to come into a court of equity to have an account taken of the assets of the testator, and of the debts due from him, and in order to ascertain whether it was necessary for the executor to sell; which would be a most serious inconvenience, and greatly retard the due settlement of estates.³

§ 1130. Where there is a devise of real estate for the payment of debts generally, or the testator charges his debts generally upon his real estate, and the money is raised by the trustee by sale or mortgage, the same rule applies as in cases of personalty, that the purchaser or mortgagee is not bound to look to the application of the purchase-money;⁴ and for the same reason, namely, the un-

¹ Sugden on Vendors, ch. 11, § 2, p. 535, 536, 538 to 540 (7th edit.); Id. vol. 2, ch. 11, § 1, p. 32 to 40 (9th edit.); 2 Fonbl. Eq. B. 2, ch. 6, § 2, and note (k); Co. Litt. 290 b, Butler's note (1), § 12; Bonney v. Ridgard, 1 Cox, R. 145; Hill v. Simpson, 7 Ves. 152; Ante, § 422 to 424; Field v. Schieffelin, 7 Johns. Ch. R. 155 to 160; Petrie v. Clark, 11 Serg. & Rawl. 377; 1 Roper on Legacies, by White, ch. 7, § 2, p. 374 to 396.

² Ibid.; Co. Litt. 290 b, Butler's note (1), § 12; Humble v. Bill, 2 Vern. 444, and Mr. Raithby's note; Ewer v. Corbet, 2 P. Will. 148; Nugent v. Gifford, 1 Atk. 463; Elliot v. Merryman, 2 Atk. 41; Crane v. Drake, 2 Vern. 616, and Mr. Raithby's note (4); Langley v. Earl of Oxford, Ambler, R. 17, and Id. App. (C. Blunt's edit.), p. 795; McLeod v. Drummond, 14 Ves. 353; S. C. 17 Ves. 153; Keane v. Robarts, 4 Madd. R. 332; Andrew v. Wrigley, 4 Bro. Ch. R. 125. See Shaw v. Borrer, 1 Keen, R. 559.

³ Ewer v. Corbet, 2 P. Will. 148; Langley v. Earl of Oxford, Ambler, R. 17; Id. App. C. p. 797, Blunt's edit.

⁴ I have contented myself with drawing from Mr. Sugden's learned Treatise on Vendors and Purchasers (ch. 11, § 1, p. 517 to 535, 7th edit.; Id. ch. 11, vol. 2, p. 30 to 57, 9th edit.) nearly all the materials used in this part of the subject. See also 1 Powell on Mortgages, ch. 9, p. 214 to 250, Coventry & Rand's edit.

limited and general nature of the trust, and the difficulty of seeing to the application of the purchase or mortgage money, without an account of all the debts and assets under the superintendence of courts of equity.¹

§ 1131. In the case of sales of real estate for the payment of debts generally, the purchaser is not only not bound to look to the application of the purchase-money; but, if more of the estate is sold than is sufficient for the purposes of the trust, it will not be to his prejudice.² Nor will it make any difference, in cases of this sort, whether the testator charges both his personal and real estate with payment of his debts, or the real only; for, ordinarily, the personal estate, unless specially exempted, is the primary fund; and, if exempted, still the charge on the real estate is general and unlimited.³ Nor will it make any difference, whether the devise directs the sale of the real estate for the payment of debts, or only charges the real estate therewith.⁴ Nor will it make any difference, that the trust is only to sell, or is a charge for so much as the personal estate is deficient to pay the debts.⁵ Nor will it make any difference, that a specific part of the real estate is devised for a particular purpose or trust, if the whole real estate is charged with the payment of debts generally by the will.⁶ If,

¹ Sugden on Vendors, ch. 11, § 1, p. 517, 518 (7th edit.); Id. ch. 11, § 1, vol. 2, p. 32 to 40 (9th edit.); Co. Litt. 290 *b*, Butler's note (1), § 12; 2 Fonbl. Eq. B. 3, ch. 6, § 2, and notes (*k*), (*l*); 1 Eq. Abr. 358, C. pl. 1, 4; Williamson v. Curtis, 3 Bro. Ch. R. 96; Powitt v. Guyon, 1 Bro. Ch. R. 186, and Mr. Belt's note; Balfour v. Welland, 16 Ves. 151; Ante, § 1127, note; Shaw v. Borrer, 1 Keen, R. 559, 573 to 576; Ball v. Harris, 4 Mylne & Craig, R. 269; Eland v. Eland, 4 Mylne & Craig, R. 420; Gardner v. Gardner, 3 Mason, 178; Wormley v. Wormley, 8 Wheat. R. 421, 442, 443; Goodrich v. Proctor, 1 Gray, 567.

² Ibid.; Spaulding v. Shalmer, 1 Vern. 301.

³ Ibid.; Co. Litt. 290 *b*, Butler's note (1), § 12; Cutler v. Coxeter, 2 Vern. 302; French v. Chichester, 2 Vern. 568; Shaw v. Borrer, 1 Keen, R. 559, 575, 576.

⁴ Sugden on Vendors, ch. 11, § 1, p. 522, 523 (7th edit.); Id. ch. 11, vol. 2, p. 37 to 39 (9th edit.); Elliott v. Merryman, Barnard, R. 78; Shaw v. Borrer, 1 Keen, R. 559, 574 to 576; Ball v. Harris, 4 Mylne & Craig, R. 264; Eland v. Eland, 4 Mylne & Craig, R. 420; Ante, § 1127.

⁵ Ibid. p. 531; Co. Litt. 290 *b*, Butler's note (1), § 12.

⁶ This point was directly decided in Shaw v. Borrer, 1 Keen, R. 559, 574 to 576. That was the case of a will, which charged the real estate generally with the payment of debts, and devised an advowson on a special trust. The trustees (one of whom was also executor) had sold the advowson; and the question was, whether they could make a good title without the institution of a suit, to ascertain whether there was a deficiency of the personal assets, and whether the purchaser

however, the trustees have only a power to sell and not an estate devised to them, then, unless the personal estate be deficient, the power to sell does not arise.¹

was bound to see to the application of the purchase-money. It was held, that he was not. Lord Langdale, on that occasion, said: "It seems, therefore, clear, that a charge of this nature has been and ought to be treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the court would, in a suit to which the executors were parties, compel the trustees for special purposes to raise the money requisite for payment of the debts. If so, is there any good reason to doubt but that the trustees and executors may themselves do that which the court would compel them to do on the application of the creditors? Though the advowson is devised to trustees for special purposes, the testator has, in the first instance, charged all his estates with payment of his debts. The charge affects the equitable, but not the legal estate; and upon the construction, the trusts of the will affect this estate, first in common with the testator's other property for the payment of debts, and, next, separately, for the special purposes mentioned in the will. Possibly, upon the testator's death, it might not be necessary to resort to the real estate at all for the payment of the testator's debts. And, if it should be necessary to resort to the real estate, some part ought, in a due administration, to be applied in payment of debts before other parts; and it is said, that the necessity for raising money to pay the debts out of the real estate, and if such necessity exists, the proper selection of that part of the real estate which ought to be first sold, ought to appear, and can only be proved by the master's report in a suit for the administration of assets. It is true, that, if the administration of assets devolves on the court by the institution of a suit for the purpose, the court, in the exercise of its jurisdiction, acts with all practicable caution, and proceeds in strict conformity with its established rules. But this is a caution, exercised, not for the benefit of the creditors or at their instance; for they ask nothing, and have a right to nothing, but payment of their debts; and the question is not, what the court thinks it right to do for the benefit of the persons who have claims subject to the debts, but whether the estate, subject to debts by the will, and sold and conveyed by the devisees for special purposes at the instance of the executors, would remain in the hands of the purchaser, subject to any claims created by, or founded on, the will; or, whether there is any obligation to see that done, which the court would do in a suit to administer assets. An argument is deduced from the statutes, which has made real estates assets, in courts of equity, for payment of simple contract debts; but it does not appear to me that the rule which the legislature has thought fit to apply, in cases where the real estate is not charged with the payment of debts, is necessarily to be applied in cases where the testator has charged his real estate with such payment. And, on the whole, considering that the charge creates or constitutes a trust for the payment of debts, or, as Lord Eldon, in one place adopting the language of Lord Thurlow, expressed it, that 'a charge is a devise of the estate in substance and effect *pro tanto* to pay the debts,' and conceiving that the purchaser is not bound either to inquire whether other sufficient

¹ Ibid.

§ 1131 *a*. The rule in all these cases, that the purchaser or mortgagee is not bound to look to the application of the purchase-money, is subject to an obvious exception, that, if the purchaser or mortgagee is knowingly a party to any breach of trust, by the sale or mortgage, it shall afford him no protection.¹ One obvious example of this is, where a devisee himself has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware or has notice of the fact, that such is its object; for in such a case they are coadjutors in the fraud.²

§ 1132. But where in cases of real estate, the trust is for the payment of legacies, or of specified or scheduled debts, the rule is different; for they are ascertained; and the purchaser may see, and, in the view of the court of equity, he is bound to see, that the money is actually applied in discharge of them.³ On the other hand, cases may occur, where the devise is for the payment of debts generally, and also for the payment of legacies, and then the trust becomes a mixed one. In such a case, the purchaser is not bound to see to the application of the purchase-money; because, to hold him liable to see the legacies paid, would, in fact, involve him in the necessity of taking an account of all the debts and assets.⁴

property is applicable, or ought to be applied first in payment of debts, or to see to the application of the purchase-money, I think that the exception must be overruled." The same doctrine was expressly affirmed by Lord Cottenham in *Ball v. Harris*, 4 Mylne & Craig, 264, 267. See also *Elliott v. Merryman*, Barnard, Ch. R. 78; *Bailey v. Ekins*, 7 Ves. 319, 323; *Dolton v. Hewen*, 6 Madd. R. 9; *Ante*, § 1127 *a*.

¹ *Eland v. Eland*, 4 Mylne & Craig, 420, 427; *Watkins v. Cheek*, 2 Sim. & Stu. 199.

² *Ibid*.

³ *Ibid*.; *Horn v. Horn*, 2 Sim. & Stu. 448. The purchaser, under a decree, is bound to see that the directions of the decree are obeyed. *Colclough v. Sterum*, 3 Bligh, R. 181. But see *Coombs v. Jordan*, 3 Bland, 284; *Wilson v. Davisson*, 2 Robinson, 385.

⁴ Sugden on Vendors, ch. 11, § 2, p. 518 (7th edit.); *Id.* ch. 11, § 1, vol. 2, p. 32, 33, of 9th edit.; Co. Litt. 200 *b*, Butler's note (1), § 12; *Rogers v. Skillicome*, Ambler, R. 188, and Mr. Blunt's note; *Johnson v. Kennett*, 6 Sim. R. 384; *Eland v. Eland*, 4 Mylne & Craig, 420; *Watkins v. Cheek*, 2 Sim. & Stu. R. 199; *Johnson v. Kennett*, 6 Simons, R. 384; S. C. 3 Mylne & Keen, 624; *Grant v. Hook*, 13 Serg. & Rawle, 259; *Andrews v. Sparhawk*, 13 Pick. 393. In *Eland v. Eland*, 4 Mylne and Craig, 420, 427, Lord Cottenham, commenting on these cases, said: "With respect to *Watkins v. Cheek*, which was one of the cases, it is only neces-

[* § 1132 *a*. And where the trust is expressed to be for the payment of debts and legacies, it will make no difference that the sary to observe, that the ground on which Sir John Leach rested his decision is wholly inapplicable here. Whether the circumstances of that case were sufficiently strong to justify the conclusion at which the learned judge arrived, it is not material to consider, the question being only as to the principle upon which Sir John Leach proceeded. Now, the principle of that decision is one which has been long established, and which does not, in the least, interfere with the rule, that, where the debts are charged generally, the purchaser or mortgagee is not bound to see to the application of the money, — a rule introduced from the peculiarity and necessity of the case. That rule, however, is subject to this obvious exception, that, if the mortgagee or purchaser is party to a breach of trust, it can afford him no protection. One obvious example is, where a devisee has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware, or has notice of the fact, that such is its object. That is the whole of the principle laid down in *Watkins v. Cheek*, and, whether the facts in that case were strong enough to support the decision, is a different, and not now a material question. It is only necessary to refer to two or three sentences in the judgment, to show that such was the principle. [His lordship here read part of Sir John Leach's judgment, and proceeded:] That case, therefore, would be a very good authority here, provided the present case afforded evidence of the mortgagee being party to a breach of trust, committed by the devise. The other case cited was *Johnson v. Kennett*, which, no doubt, would carry the doctrine a great deal further; for there was no evidence, in that case, of any breach of trust. But then the purchaser had reason to believe, from the nature of the transaction itself, that the debts had been paid off; and being of that opinion upon the evidence, the Vice-Chancellor considered that the case was the same as if nothing but legacies had been originally charged; in which case, not being protected by an immediate charge of debts, the purchaser would not be exonerated from his liability to see the money properly applied. If that doctrine had been supported, it would have gone far to destroy the rule altogether; because, before it can come to that, the mortgagee must (and if he is to be liable, he must in every case) go into an investigation of the fact of how far the debts have been discharged, — exactly that liability to which the law considers that he should not be subjected. That was one of the two grounds on which the Vice-Chancellor rested his judgment in *Johnson v. Kennett*, namely, that the transaction afforded evidence that all the debts had been paid; the other being, that, from the form of the conveyance, it appeared, that the party who sold was dealing with the purchasers as owner of the estate. The latter ground is manifestly untenable. What evidence is it of a breach of trust, that a party having such an estate, subject to such a charge, sells the estate as his own? He is in truth the owner, subject to a charge; and it is his duty to satisfy the debts, which the sale may be the very means of enabling him to do. When *Johnson v. Kennett* was brought by appeal before Lord Lyndhurst, his lordship reversed the decree, and observed, that the rule of a purchaser being protected from seeing to the application of his purchase-money by a general charge of debts and legacies, had reference to the state of things at the death of the testator; and that if the debts

purchaser had notice that there are no debts, and that this was so at the death of the testator. The form of such a bequest implies a confidence reposed in the trustee, in regard to the application of the purchase-money; and in all such cases it is unreasonable to require the purchaser to look to the application.¹ And this is a principle which will, we apprehend, ultimately mark an intelligible distinction among the cases, in regard to this question.]

§ 1133. Where the time directed by the devise for a sale of the real estate has arrived, and the persons entitled to the money are infants, or are unborn; there, the purchaser is not bound to see to the application of the purchase-money, because he might otherwise be implicated by a trust of long duration.² But, if an estate is charged with a sum of money, payable to an infant at his majority; there, the purchaser is bound to see the money duly paid on his arrival at age; for the estate will remain chargeable with it in his hands.³

§ 1134. Where the trusts are defined, and yet the money is not merely to be paid over to third persons, but it is to be applied by were afterwards paid, leaving the legacies charged, that could not vary the rule. I entirely concur in that opinion; otherwise, the mortgagee must in every case, in which there is a charge of legacies, take upon himself to investigate and ascertain whether the debts have been paid or not. Taking, then, *Watkins v. Cheek*, as proceeding on the ground of fraud, and taking *Johnson v. Kennett*, decided by Lord Lyndhurst on appeal, as maintaining and not impeaching the rule, I have no doubt that the rule rests exactly as it did before those cases were determined, and has not been shaken by either of them. The present is the case of a devise, subject to the payment of debts and legacies; and, according to the master's report, here is a debt not paid. How then does the case stand? According to the decision, the mortgagee has a right to hold the estate discharged of any obligation to see to the application of the purchase-money, except, in so far as she, by her own deed, undertakes to be responsible. She is only purchaser of so much of the estate as may remain, after payment of the annuity and legacies,—and there is no dispute as to her being liable to that extent,—while she is protected from seeing to the application of the mortgage-money beyond. If so, she is then entitled to the whole of the proceeds of the estate as his security, ultra the amount of the excepted legacies; and that amount has been deducted; and, so far, the mortgagee is safe from any other claim."

¹ [* *Stroughill v. Anstey*, 1 De G. M. & G. 635. See also *Andrews v. Sparhawk*, 13 Pick. R. 393; *Hauser v. Shore*, 5 Ired. Eq. 357; *Canbury v. Duval*, 10 Penn. St. 267; Ad. Eq. Am. note, 156.]

² Sugden on Vendors, ch. 11, § 1, p. 519 (7th edit.); Id. ch. 11, § 1, vol. 2, p. 32 to 34 (9th edit.); *Sowarsby v. Lacy*, 4 Madd. R. 142; *Lavender v. Stanton*, 6 Madd. R. 46; *Breedon v. Breedon*, 1 Russ. & Mylne, 413.

³ Ibid.; *Dickinson v. Dickinson*, 3 Bro. Ch. R. 19.

the trustees to certain purposes, which require, on their part, time, deliberation, and discretion, it seems that the purchaser is not bound to see to the due application of the purchase-money;¹ as, where it is to pay all debts, which shall be ascertained within eighteen months after the sale; or where the trustees are to lay out the money in the funds, or in the purchase of other lands upon certain trusts.² [So, where a sale is made by trustees, under a power to sell and reinvest upon the same trusts, it has been held in America, that the purchaser is not bound to see to the disposition of the purchase-money.³]

§ 1135. These are some of the most important and nice distinctions which have been adopted by courts of equity upon this intricate topic; and they lead strongly to the conclusion, to which not only eminent jurists, but also eminent judges, have arrived, that it would have been far better to have held in all cases, that the party, having the right to sell, had also the right to receive the purchase-money, without any further responsibility on the part of the purchaser, as to its application.

CHAPTER XXXII.

CHARITIES:

[* § 1136. Charities an important branch of trusts.

§ 1137. The civil law regarded charities with favor.

§ 1138. So also did it all gifts for public purposes.

§ 1139. How charities were sustained by the civil law.

§ 1140. Not allowed to fail for want of trustee, or object.

§ 1141, 1141 *a*. Law of charities derived through the civil law, but chiefly matured by Christianity.

§ 1142. English law of charities before statute of Elizabeth.

§ 1143 - 1145. Equity having recognized charitable bequests as valid led to the statute of Elizabeth.

§ 1146 At common law, bequests for charity required trustee.

¹ Sugden on Vendors, ch. 11, § 1, p. 520, 521 (7th edit.); *Id.* ch. 11, § 1, vol. 2, p. 35, 36 (9th edit.); *Balfour v. Welland*, 16 Ves. 151; *Wormley v. Wormley*; 8 Wheat. R. 421, 442, 443.

² *Ibid.*; *Wormley v. Wormley*, 8 Wheat. R. 422, 442, 443.

³ See *Lining v. Peyton*, 2 Desauss. 375; *Redheimer v. Pyson*, 1 Spear's Eq. R. 135. See also *Nichols v. Peak*, Beasley, Ch. R. 69.

§ 1147. Doubt whether original bill lay, in cases of charity, before statute of Elizabeth.
 § 1148-1154 c. It seems to be settled finally, that equity did sustain charitable bequests, independent of the statute.

§ 1154 d. The same rule prevails generally in America.

§ 1155. Since the statute of Elizabeth, the jurisdiction is confined to the objects there enumerated.

§ 1156. Trusts too indefinite are void, and the trustee holds for him who is legally entitled.

§ 1156 a, 1157. Bequests void for uncertainty under the statute.

§ 1158. The bequests must be charitable within statute.

§ 1159. Abstract of the provisions of statute of Elizabeth.

§ 1160. Enumeration of charitable uses specified in statute.

§ 1161. Chancery has jurisdiction of charities by bill.

§ 1162. The original jurisdiction clear before statute.

§ 1163. The form of proceeding is by information of the attorney-general.

§ 1164. What charities come within the statute.

§ 1165. Bequests for charity liberally construed.

§ 1165 a. Bequest for museum not a charity.

§ 1166. Legacy lapsed, as to trustees, enforced for charity.

§ 1167. Equity supplies defects in charitable bequests.

§ 1168. Equity will substitute legal for illegal object.

§ 1169, 1170. This doctrine, *cy pres*, dates early in the civil law, and will be enforced even where there is no legal trustee in existence.

§ 1170 a-1181. Charities so given that the objects fail will be given by the court to kindred objects, upon a new scheme drawn up under the direction of the court.

§ 1171. Equity will supply defects in conveyances to charity.

§ 1172. Charities sustained with marked qualification of will of testator.

§ 1173. Often, in former times, sustained by forced constructions.

§ 1174. These decisions cannot now be disregarded.

§ 1175. Charities cannot be altered after death of donor.

§ 1176. Will not be diverted from original purpose.

§ 1177. Court of equity acts on failure of trustee.

§ 1178. Accumulations applied to kindred objects.

§ 1178 a. Trustee changed for incapacity or unfaithfulness.

§ 1179. Charitable legacies abate in proportion to others.

§ 1180, 1180 a. Assets not marshalled to support prohibited charities.

§ 1182. Bequests for specific charity, which fails, go to personal representative.

§ 1183. General, indefinite, private charities, not within statute, and void.

§ 1184. Bequests for foreign charities, not illegal here, carried into effect.

§ 1185. Conflict with mortmain acts will not avoid such bequests.

§ 1186. Will order money paid to trustees in foreign state.

§ 1187. Courts of equity may control charities, as trusts.

§ 1188. Jurisdiction of chancellor, personal, under statute.

§ 1189. May also proceed by original bill or by information.

§ 1190. The king administers indefinite charities; the court those whose objects and trustees are defined.

§ 1191. Trustees have the right to administer charities, in discretion. May be removed for neglect of duty, by court of chancery.

§ 1191 a. The will of donor deducible from his known opinions.

§ 1192. The informer of charities sometimes made a beneficiary.

§ 1192 a. Charitable trusts not affected by statutes of limitation or lapse of time.

§ 1193 – 1194. The statute of 9th Geo. II. ch. 36, has tended to lessen charitable bequests. But has not been generally adopted in this country.

§ 1194 *a.* How courts of equity will dispose of the surplus income of charity funds.

§ 1194 *b.* Courts of equity may remodel scheme for administration of charity.

§ 1194 *c.* What amounts to public charity, and how administered.

§ 1194 *d.* Religious corporations cannot, by their own act, place their property beyond their own control.

§ 1136. IT is in cases of wills also that we most usually find provisions for public CHARITIES; and to the consideration of this subject, constituting as it does, a large and peculiar source of equity jurisdiction under the head of trusts, we shall now proceed.¹

§ 1137. It is highly probable that the rudiments of the law of charities were derived from the Roman or civil law.² One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the Church.³ This permission was soon abused to so great a degree as to induce the Emperor Valentinian to enact a mortmain law, by which it was restrained.⁴ But this restraint

¹ A considerable portion of the succeeding account of Charities, and of the jurisdiction exercised by courts of equity, touching the same, is, with some additions and alterations, a transcript of the note (1) in the Appendix to 4 Wheaton's Rep. p. 1 to 23. It becomes necessary, therefore, to say that that note was written by me at the request of that able and learned Reporter, with an express understanding that its author should not then be made known. I now reluctantly disclose the authorship. But in discussing the same subject (which I had fully examined at the time, when I prepared my opinion in the case of *The Trustees of the Philadelphia Baptist Association v. Smith*, since published in the Appendix to 3 Peters's Reports, 481 to 593), it became impossible for me, in the present work, to avoid going over the same ground in language or manner, substantially different from that note; and I have been compelled, therefore, to make the present avowal, since I should otherwise seem to have appropriated so large a portion of the labors of another.

² In Lord Chief Justice Wilmut's notes of his opinions (p. 53, 54), it is said: "Donations for public purposes were sustained in the civil law, and applied when illegal *cy pres* to other purposes, one hundred years before Christianity was the religion of the Empire." And for this is cited Dig. Lib. 33, tit. 2, De Usu et Usufruc. Legatarum, § 16, 17.

³ Cod. Theodos. Lib. 16, tit. 2, l. 4.

⁴ Cod. Theodos. Lib. 16, tit. 2, l. 20. To those who may not be familiar with the term "mortmain," it may be proper to state that the statutes in England, which prohibit corporations from taking lands by devise, even for charities, except in certain special cases, are generally called The Statutes of Mortmain, *mortuâ manu*, for the reason of which appellation Sir Edward Coke offers many conjectures. But (says Mr. Justice Blackstone, 1 Black. Comm. 479), there is one

was gradually relaxed ; and in the time of Justinian it became a fixed maxim of Roman jurisprudence, that legacies to pious uses (which included all legacies destined for works of piety or charity, whether they related to spiritual or to temporal concerns) were entitled to peculiar favor, and to be deemed privileged testaments.¹

§ 1138. Thus, for example, a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, were esteemed legacies to pious and charitable uses.² In all these cases the bequests had their charitable motives, independent of the consideration of the merit of the particular legatees. But other legacies, although not of a pious or charitable nature, but yet for objects of a public nature, or for a general benefit, were also deemed entitled to the like encouragement and protection. Thus, for example, a legacy destined for some public ornament, or for some public use, such as to build a gate for a city, or for the embellishment and improvement of a public street or square, or as a prize to persons excelling in an art or science, was deemed a privileged legacy, and a complete validity.³ *Si quid relictum sit civitatibus, omne valet, sive in distributionem relinquatur, sive in opus, sive in alimenta, vel in eruditionem puerorum, sive quid aliud.*⁴ Again: *Civitatis legari potest etiam, quod ad honorem ornatumque civitatis pertinet. Ad ornatum ; puta, quod instruendum forum, theatrum, stadium, legatum fuerit. Ad honorem ; puta, quod ad munus edendum, venationemve, ludos scenicos ludos Circenses, relictum fuerit ; aut, quod ad divisionem singulorum civium vel epulam, relictum fuerit. Hoc amplius, quod in alimenta infirmæ ætatis, (puta, senioribus, vel*

which seems more probable than any that he has given us, namely, that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law ; land, therefore, holden by them might, with great propriety, be said to be held *in mortuâ manu*. The word is now commonly employed to designate all prohibitory laws which limit, restrain, or annul gifts, grants, or devises of lands and other corporeal hereditaments to charitable uses. See, on this subject, 2 Black. Comm. 268 to 274.

¹ 2 Domat, Civil Law, B. 4, tit. 2, § 6, art. 127, p. 168 to 170, by Strahan ; Ferrier, Dict. h. t. ; Swinburne, Pt. 1, § 16, p. 103 ; Trustees of Baptist Association v. Hart's Executors, 4 Wheat. R. 1 ; S. C. 2 Peters, R. App. 481.

² 2 Domat, B. 4, tit. 2, § 6, art. 1, p. 168, art. 2, p. 169.

³ 2 Domat, B. 4, tit. 2, § 6, art. 3, p. 169.

⁴ Ibid. ; art. 6, p. 170 ; Dig. Lib. 30, tit. 1, l. 117.

*pueris, puellisque,) relictum fuerit ; ad honorem civitatis pertinere respondetur.*¹

§ 1139. The construction of testaments of this nature was most liberal ; and the legacies were never permitted to be lost, either by the uncertainty or failure of the persons or objects for which they were destined. Hence, if a legacy was given to the church, or to the poor generally, without any description of what Church, or what poor, the law sustained it, by giving it in the first case to the parish church of the place where the testator lived ; and in the latter case to the hospital of the same place ; and if there was none, then to the poor of the same parish.² The same rule was applied where, instead of a bare legacy, the testator appointed as his heir, or devisee, or legatee, the church of the poor. It was construed to belong to the church, or the poor of the parish, where he resided.³ So if a legacy were given to God, (as seems sometimes to have been the usage in the time of Justinian,) it was construed to be a legacy to the church of the parish where the testator resided.⁴

§ 1140. If the testator himself had designated the person by whom the charity was to be carried into effect, he was compellable to perform it. If no person was designated, the bishop or ordinary of the place of the testator's nativity might compel its due execution.⁵ And in all cases where the objects were indefinite, the legacy was carried into effect under the direction of the judge, who had cognizance of the subject.⁶ So if a legacy was given for a definite object, which either was previously accomplished, or which failed, it was, nevertheless, held valid, and applied under judicial discretion to some other object.⁷ Thus, for example, if the testator had left a legacy for building a parish church, or an apartment in a hospital, and before his death the church or apartment had been built, or it was not necessary or useful, the legacy did not become a nullity, but it was applied by the proper functionary to some other purposes of piety or

¹ Ibid. ; Dig. Lib. 30, tit. 1, l. 122.

² 2 Domat, B. 4, tit. 2, § 6, art. 1, p. 169 ; Ferriere, Dict. h. t.

³ 2 Domat, B. 4, tit. 2, § 6, art. 4, p. 169.

⁴ Ibid. ; Novellæ, 141, cap. 9.

⁵ 2 Domat, B. 4, tit. 2, § 6, art. 5, p. 169 ; Cod. Lib. 1, tit. 3, l. 28, § 1.

⁶ 2 Domat, B. 4, tit. 2, § 6, art. 5, p. 169 ; Swinburne, Pt. 1, § 16, p. 104.

⁷ 2 Domat, B. 4, tit. 2, § 6, art. 6, p. 170.

charity.¹ And we shall presently see, that the like doctrine has been carried to a great extent in the jurisprudence of England on the same subject.

§ 1141. The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce these principles of pious legacies into the common law of England; and the zeal and learning of the ecclesiastical tribunals must have been constantly exercised to enlarge their operation. Lord Thurlow² was clearly of opinion, that the doctrine of charities grew up from the civil law; and Lord Eldon,³ in assenting to that opinion, has judiciously remarked, that at an early period the ordinary had the power to apply a portion of every man's personal estate to charity; and when, afterwards, the statute compelled a distribution, it is not impossible that the same favor should have been extended to charity in wills, which, by their own force, purported to authorize such a distribution. Be the origin, however, what it may, it cannot be denied that many of the privileges attached to pious legacies have been for ages incorporated into the English law.⁴ Indeed, in former times, the construction of charitable bequests was pushed to the most alarming extravagance. And although it has been in a great measure checked in later and more enlightened times, there are still some anomalies in the law on this subject which are hardly reconcilable with any sound principles of judicial interpretation, or with any proper exercise of judicial authority.

[* § 1141 *a*. We have no disposition to volunteer an opinion in regard to the origin of the present equity law applicable to charities. It is not improbable that it may have been derived through the channel of the Roman civil law. But it is probable, notwithstanding speculations to the contrary, that the maturity of modern equity law governing charities is to be ascribed mainly to the benign influence of Christianity, operating from a very early day, upon all the institutions of modern civilization; and upon none in larger measure than upon those great charities, in European countries, which have been the admiration of the de-

¹ *Ibid*.

² *White v. White*, 1 Bro. Ch. Cas. 12.

³ *Moggridge v. Thackwell*, 7 Ves. 36, 69; *Mills v. Farmer*, 1 Meriv. 55, 94, 95.

⁴ *Swinb. on Wills*, Pt. 1, § 16, p. 66 to 73; *Trustees of Baptist Association v. Hart's Ex'ors*, 3 Peters, R. App. 481 to 483.

vout, the scoff of the profane, and the wonder of all, in later ages. If men could know precisely how much our boasted civilization depends upon, and is modified by, even Mediæval Christianity, they would, perhaps, learn to speak more reverently of all its institutions of whatever date.^{1]}

§ 1142. The history of the law of charities, prior to the statute of the 43d of Elizabeth, ch. 4, which is emphatically called the statute of charitable uses, is extremely obscure. It may, nevertheless, be useful to endeavor to trace the general outline of that history, since it may materially assist us in ascertaining how far the present authority and doctrines of the Court of Chancery, in regard to charitable uses, depend upon that statute; and how far they arise from its general jurisdiction, as a court of equity, to enforce trusts, and especially to enforce trusts to pious uses.²

§ 1143. It is not easy to arrive at any satisfactory conclusion on this head. Until a comparatively recent period, and, indeed, until the report of the Commissioners on the Public Records, published by Parliament in 1827 (to which our attention will be more directly drawn hereafter), few traces could be found in the volumes of printed reports, or otherwise, of the exercise of this jurisdiction, in any shape, prior to the statute of Elizabeth. The principal, if not the only cases then to be found, were decided in the courts of common law, and generally turned upon the question, whether the uses were void, or not, within the statutes against superstitious uses.³ One of the earliest cases is Porter's case;⁴ which was a devise of lands, devisable by custom, to the

¹ *Post*, § 1169, and authorities cited.

² Mr. Justice Baldwin, in his very learned and elaborate judgment on the will of Sarah Zane, in the Circuit Court of Pennsylvania, April Term, 1833 (which is in print), has gone into full consideration of this whole subject, and collected many cases antecedent to the statute of Elizabeth, which may lead to some question, whether the origin commonly assigned to charitable uses is perfectly correct. I have, however, left the text, as it is, upon the authority of the English judges, as a minute inquiry into the subject would lead the reader too far aside from the direct object of these Commentaries. But the judgment of Mr. Justice Baldwin will amply reward a diligent perusal. Brightly, R. 346, note. Mr. Boyle, in his work on Charities, B. 1, ch. 1, p. 1 to 63 (1837), has given a concise view of the statutes respecting charities prior to that of the 43d Elizabeth. See also *Shotwell v. Mott*, 2 Sandford, R. 45.

³ See Mr. Justice Baldwin's opinion in the case of Sarah Zane's Will, Cir. Ct. Pennsylvania, April Term, 1833, Brightly, R. 346, note.

⁴ 1 Co. 22 b, in 34 and 35 Elizabeth. See also a like decision in *Partridge v.*

testator's wife in fee, upon condition that she should assure the lands, devised for the maintenance and continuance of a free school, and certain almsmen and almswomen; and it appeared that the heir had entered for a condition broken, and conveyed the same lands to the queen. It was held, that the use, being for charity, was a good and lawful use, and not void by the statutes against superstitious uses; and that the queen might well hold the land for the charitable uses. Lord Loughborough, in commenting on this case, observed: "It does not appear, that this court, at that period, had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere,¹ as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (that is, an information to establish a charity); but they made out their case, as well as they could, by law."²

§ 1144. So, that the result of Lord Loughborough's researches on this point was that, until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities. It is remarkable, that Sir Thomas Egerton and Lord Coke, who argued Porter's case for the queen, although they cited many antecedent cases, refer to none, which were not decided at law. And the doctrine established by Porter's case is, that if a feoffment is made to a general legal use, not superstitious, although indefinite, although no person is *in esse*, who could be the *cestui que use*, yet the feoffment is good; and if the use is bad, the heir of the feoffor will be entitled to enter, the legal estate remaining in him.³

§ 1145. The absence, therefore, of all authority derived from Walker, cited 4 Co. 116 *b*; *Martidale v. Martin*, Co. Eliz. 288; Thetford School, 8 Co. 130.

¹ Sir Thomas Egerton was made Lord Chancellor in 39 Elizabeth, 1596, and was created Lord Ellesmere, 1 James I. 1603.

² *Attorney-General v. Bowyer*, 3 Ves. 714, 726. In *Eyre v. Countess of Shaftesbury*, 2 P. Williams, 119, Sir Joseph Jekyll, M. R. said: "In like manner, in case of charity, the king has, *pro bono publico*, an original right to superintend the case thereof; so that abstracted from the statute of Elizabeth, relating to charitable uses and antecedent to it as well as since, it has been every day's practice to informations in chancery in the attorney-general's name, for the establishment of charities." Lord Somers, in *Cary v. Bertie*, 2 Vern. R. 333, 342, made remarks to somewhat the same purpose, which Sir Joseph Jekyll cited and approved. *Post*, § 1148; *Attorney-General v. Brereton*, 2 Ves. 425, 427.

³ 3 Ves. Jr. 726.

any known antecedent equity decisions upon an occasion when they would probably have been used, if any existed, did certainly seem very much to favor the conclusion of Lord Loughborough. And in the absence of any such known antecedent decisions, it was not a rash conjecture, for it would be but a conjecture, that Porter's case, having established that charitable uses, not superstitious, were good at law, the Court of Chancery, in analogy to the other cases of trusts, immediately afterwards held the feoffees to such uses accountable in equity for the due execution of them; and that the inconveniences felt in resorting to this new and anomalous proceeding, from the indefinite nature of some of the uses, gave rise, within a few years, to the statute of 43 Elizabeth, ch. 4.¹

§ 1146. This view might also have some tendency to reconcile the language of Lord Loughborough with that of an opposite character, used upon other occasions by other chancellors and judges, in reference to the jurisdiction of chancery over charities,² as it would show, that in cases of feoffments to charitable uses, bills to establish those uses might in fact have been introduced, or brought into familiar practice, by Lord Ellesmere, about five years before the statute of Elizabeth. This would be quite consistent with the fact, that such bills were not sustained where the donation was to charity generally, and no trust estate was interposed, and no legal estate was devised, to support the uses. It is very certain, that, at law, devises to charitable uses generally, without interposing a trustee, and devises to a non-existing corporation, or to an unincorporated society, would have been, and in fact were, held utterly void for want of a person having a sufficient capacity to take as devisee.³ The statute of Elizabeth, in favor of charitable uses, cured this defect,⁴ and provided (as we shall hereafter have occasion more fully to consider) a new mode of enforcing such uses by a commission under the direction of the Court of Chancery.

¹ There was, in fact, an act passed, respecting charitable uses, in 39 Elizabeth, ch. 9; but it was repealed by the act of 43 Elizabeth, ch. 4. Com. Dig. *Charitable Uses*, N. 14.

² See *Ante*, § 1143, note; *Post*, § 1148.

³ Anon. 1 Ch. Cas. 207; Attorney-General v. Tancred, 1 W. Bl. 90; S. C. Ambler, R. 351; Collinson's case, Hob. R. 136; S. C. Moore, 888; Widmore v. Woodruffe, Ambler, R. 636, 640; Com. Dig. *Devise*, K.; Baptist Association v. Hart's Ex'rs, 4 Wheat. R. 1; McCord v. O'Chiltree, 8 Blackf. 22.

⁴ Com. Dig. *Charitable Uses*, N. 11; Com. Dig. *Chancery*, 2 N. 10.

§ 1147. Shortly after this statute, it became a matter of doubt, whether the Court of Chancery could grant relief by original bill in cases within that statute, or whether the remedy was not confined to the proceeding by commission under the statute. That doubt remained until the reign of Charles II., when it was settled in favor of the jurisdiction of the court by original bill.¹ On one occasion, when this very question was argued before him, Lord Keeper Bridgman declared, "That the king, as *pater patriæ*, may inform for any public benefit for charitable uses, before the statute of 30 [43] of Elizabeth, for charitable uses. But it was doubted, the court could not by bill take notice of that statute, so as to grant a relief according to that statute upon a bill."² On another occasion soon afterwards, where the devise was to a college, and was held void at law by the judges, for a misnomer, on a bill to establish the devise as a charity, the same question was argued; Lord Keeper Finch (afterwards Lord Nottingham) held the devise good, as an appointment under the statute of Elizabeth; and he "decreed the charity, though before the statute no such decree could have been made."³ It would seem, therefore, to have been the opinion of Lord Nottingham, that an original bill would not, before the statute of Elizabeth, lie to establish a charity, where the estate did not pass at law, to which the charitable uses attached.

§ 1148. On the other hand, the language of other judges leads to the conclusion that antecedent to the statute of Elizabeth, the Court of Chancery did, in virtue of its inherent authority, exercise a large jurisdiction in cases of charities. In *Eyre v. Shaftesbury*,⁴ Sir Joseph Jekyll said, in the course of his reasoning on

¹ *Attorney-General v. Newman*, 1 Ch. Cas. 157; S. C. 1 Lev. 284; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 119; *Attorney-General v. Brenton*, 2 Ves. 425, 427; *West v. Knight*, 1 Ch. Cas. 134; *Anon.* 1 Ch. Cas. 267; 2 Fonbl. Eq. B. 3, pl. 2, ch. 1, § 1; *Parish of St. Dunstan v. Beauchamp*, 1 Ch. Cas. 193.

² *Attorney-General v. Newman*, 1 Ch. Cas. 157. See also 2 Black. Comm. 427; *Lord Falkland, Cary v. Bertie*, 2 Vern. 342; *Gilb. Eq. R.* 172. See also *Attorney-General v. Mayor, &c. of Dublin*, 1 Bligh, R. (N. S.) 347, 348; *Wilmot's Notes*, 24; *Shelford on Mortg. and Charities*, ch. 4, p. 267; *Corp. of Ludlow v. Greenhouse*, 1 Bligh, R. (N. S.) 48; *Wellbeloved v. Jones*, 1 Sim. & Stu. 43; *Attorney-General v. Brown*, 1 Swanst. R. 265, 290, 291. In *Attorney-General v. Mayor of Dublin*, 1 Bligh (N. S.) Rep. 312, 347, Lord Redesdale said that the statute of Elizabeth gave a new remedy; but created no new law respecting charities.

³ *Anon.* 1 Ch. Cas. 267.

⁴ 2 P. Will. 103, 118. Cited also 7 Ves. Jr. 63, 87; and by Mr. Ch. Justice Wilmot, in *Wilmot's Notes of Cases*, 24.

another point: "In like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery, in the attorney-general's name, for the establishment of charities." In the *Bailiffs, &c. of Burford v. Lenthall*,¹ Lord Hardwicke is reported to have said: "The courts have mixed the jurisdiction of bringing informations in the name of the attorney-general with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion."

§ 1149. In a subsequent case,² which was an information filed by the attorney-general against the master and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of the Court of Chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitatorial powers, said: "Consider the nature of the foundation. It is at the petition of two private persons, by charter of the crown, which distinguishes this case from cases of the statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the peculiar purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity; because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate. But where there is a charter, with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief; yet that information is not to be dismissed, but there must be

¹ Atk. 550 (1743).

² *Attorney-General v. Middleton* (1751), 2 Ves. 327.

a decree for the establishment.¹ That is always with this distinction, where it is a charity at large, or in its nature, before the statute of charitable uses; but not in the case of charities incorporated and established by the king's charter, under the great seal, which are established by proper authority allowed." And again: "It is true that an information in the name of the attorney-general, as an officer of the crown, was not a head of the statute of charitable uses, because that original jurisdiction was exercised in this court before. But that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown."

§ 1150. It was manifestly, therefore, the opinion of Lord Hardwicke, that, independent of the statute of Elizabeth, the Court of Chancery did exercise original jurisdiction in cases of charities at large, which he explains to mean charities not regulated by charter. But it does not appear that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee, capable of taking, and those where the purpose was general charity, without the interposition of any trust to carry it into effect. The same remark applies to the *dictum* by Sir Joseph Jekyll.

§ 1151. In a still later case,² which was an information to establish a charity, and aid a conveyance in remainder to certain officers of Christ's College to certain charitable uses, Lord Keeper Henley (afterwards Lord Northington) is reported to have said: "The conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and, therefore, there is a want of proper persons to take in perpetual succession. The only doubt is, whether the court shall supply this defect for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court, before, at, and after the statute of Elizabeth, to have been, that, where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute of Henry VIII., yet they were always considered as good in equity, if given to charitable uses." And he then proceeded to declare,

¹ S. P. Attorney-General v. Brenton, 2 Ves. 425, 427; *Post*, § 1163.

² Attorney-General v. Tancred, 1 W. Bl. 90; S. C. Ambler, 351; 1 Eden, R. 10.

that he was obliged, by the uniform course of precedents, to assist the conveyance ; and, therefore, he established the conveyance expressly under the statute of Elizabeth.

§ 1152. There is some reason to question, whether the language here imputed to Lord Northington is minutely accurate. His lordship manifestly aided the conveyance, as a charity, in virtue of the statute of Elizabeth. And there is no doubt, that it has been the constant practice of the court, since that statute, to aid defects in conveyances to charitable uses. But it is by no means clear that such defects were aided, before that statute. The old cases, although arising before the statute, were deemed to be within the reach of that statute by its retrospective language ; and were expressly decided on that ground.¹ The very case put of devises to corporations, which are void under the statute of Henry VIII., and are held good solely by the statute of Elizabeth, shows that his lordship was looking to that statute ; for it is plain, that a devise, void by statute, cannot be made good upon any principles of general law. What, therefore, is supposed to have been stated by him, as being the practice before the statute, is probably, if not founded in the mistake of the reporter, an inadvertent statement of the learned chancellor. The same case is reported in another book, where the language reported to have been used by him is : “ The constant rule of the court has always been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment ; as in *Jesus College, Collison’s case in Hobart*, 136.”² Now, *Collison’s case* was expressly held to be sustainable, only as an appointment under the statute of Elizabeth ; and this shows that the language of his lordship was probably meant to be limited to cases governed by that statute.

§ 1153. In a more recent charity case, Sir Arthur Piggott in argument said : “ The difference between the case of individuals and that of charities is founded on a principle which has been established ever since the statute of charitable uses, in the reign of Elizabeth, and has been constantly acted upon from those days

¹ *Collison’s case*, Hob. R. 136 ; S. C. Moore, 888 ; Ibid. 822 ; Sir Thomas Middleton’s case, Moore, 889 ; Rivett’s case, Moore, 890, and the cases cited in Raithby’s note to *Attorney-General v. Rye*, 2 Vern. 453 ; *Duke on Charit.* 74, 77, 83, 84 ; *Bridg. on Charit.* 366, 370, 379, 380 ; *Duke on Charit.* 105 to 113.

² Ambler, R. 351.

to the present." Lord Eldon adopted the remark, and said: "I am fully satisfied as to all the principles laid down in the course of this argument, and to accede to them all." His lordship then proceeded to discuss the most material of the principles and cases from the time of Elizabeth, and built his reasoning, as indeed he had built it before, upon the supposition, that the doctrine in chancery, as now established, rested mainly on that statute.¹

§ 1154. Such were the principal cases, or at least the principal cases which my own researches have brought to my notice at the time when the present work was first published, wherein the jurisdiction of chancery over charities, antecedent to the statute of Elizabeth, had been directly or incidentally discussed. The circumstance that no cases, prior to that time, could then be found in equity jurisprudence; the tradition that had passed down to our own times, that original bills to establish charities were first entertained in the time of Lord Ellesmere; the fact, that the cases immediately succeeding that statute, in which devises, void at law, were held good in equity as charities, might have been argued and sustained upon the general jurisdiction of the court, if it then existed, and yet were exclusively argued and decreed upon the footing of that statute. These facts and circumstances did certainly seem to afford a strong presumption that the jurisdiction of the court to enforce charities, where no trust is interposed, and where no devisee is *in esse*, and where the charity is general and indefinite, both as to persons and objects, mainly rests upon the constructions (whether ill or well founded is now of no consequence) of the statute of Elizabeth. And accordingly that conclusion was arrived at and sustained on a very important occasion by the Supreme Court of the United States.²

¹ *Mills v. Farmer*, 1 Meriv. R. 55, 86, 94, 100; *Moggridge v. Thackwell*, 7 Ves. 36; *Attorney-General v. Bowyer*, 3 Ves. 714, 726. See the remarks of Lord Eldon in the more recent cases of *Attorney-General v. Skinners' Company*, 2 Rep. R. 420, and *Sir John Leach, in Attorney-General v. Brentwood School*, 1 Mylne & Keen, 376, and Lord Redesdale's remarks in the *Attorney-General v. Corpor. of Dublin*, 1 Bligh, R. 347 (N. S.).

² This whole subject was most elaborately considered, and all the leading authorities investigated, by Mr. Chief Justice Marshall, in delivering the opinion of the court in the case of *The Baptist Association v. Hart's Ex'rs* (4 Wheat. 1). In that case, the court arrived at the conclusion, upon a full survey of all the authorities, that charities, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, could be

§ 1154^a. Since that period, however, the subject has undergone a more full and elaborate consideration, both in Great Britain and in America. Lord Eldon, in a case calling for an expression of his opinion upon the point in 1826, took occasion to observe: "It may not be quite clear that these instruments, originally void, were held to be valid merely by the effect of the 43d of Elizabeth. It might have been supposed that there was in the court a jurisdiction to render effective an imperfect conveyance for charitable purposes; and the statute has, perhaps, been construed with reference to such, the supposed jurisdiction of this court; so that it was not by the effect of the 43d Elizabeth alone, but by the operation of that statute on a supposed antecedent jurisdiction in the court, that void devises to charitable purposes were sustained. Out of that supposed jurisdiction this construction of the statute may have arisen."¹ In 1834, in the case of the Brentwood Grammar School, a charity founded in the reign of Philip and Mary came under the consideration of Sir John Leach, the Master of the Rolls, and it then appeared that the charity was mainly to found and endow a grammar school at Brentwood, and was established by a decree of the Court of Chancery as early as the 12th of Elizabeth, although it included also a provision for the support of "five poor folks in Southweald"; and Sir John Leach, upon the bill before him for the establishment of a proper scheme for the charities, affirmed the original decree.² Lord Redesdale, in a very important case before the House of Lords, in 1827, expressed himself to the following effect: "We are referred to the statute of Elizabeth, with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law; it created a new and ancillary jurisdiction, a jurisdiction borrowed from the elements which I have mentioned, a jurisdiction created by a commission to be issued out of the Court of Chancery to inquire whether the funds given for charitable purposes had or had not been misapplied, and to see to their proper application; but the

established by a court of equity, either exercising its ordinary jurisdiction, or exercising the prerogative of the king as *parens patriæ*, before the statute of Elizabeth. See also *Gallego v. Attorney-General*, 2 Leigh, R. 450; *McCord v. O'Chil-tree*, 8 Blackf. 22; 3 Kent, Comm. Lect. 68, p. 508, note (*d*), 4th edit.

² *Attorney-General v. Skinners' Company*, 2 Russ. Ch. R. 407, 420.

³ *Attorney-General v. Brentwood School*, 1 Mylne & Keen, 376.

proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery, as it existed before the passing of that statute; and there can be no doubt that, by information by the attorney-general, the same thing might be done. While proceedings under that statute were in common practice, (as appears in that collection which is called Duke's Charitable Uses,) you will find it stated that in certain cases, although a commission might issue under the statute, an information by the attorney-general was the better remedy. In process of time, indeed, it was found that the commission of charitable uses was not the best remedy,¹ and that it was better to resort again to the proceedings by way of information in the name of the attorney-general. The right which the attorney-general has to file an information is a right of prerogative; the king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases; the case of lunatics, where he has also a special prerogative to take care of the property of a lunatic, and where he may grant the custody to a person who, as a committee, may proceed on behalf of the lunatic, or where there is no such grant the attorney-general may proceed by his information."¹

§ 1154 *b*. On a still more recent occasion in Ireland, Lord Chancellor Sugden examined the whole subject with great diligence and learning, and reviewed historically the leading authorities. The conclusion at which he arrived was, that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.² But the most authentic and at the same time the

¹ Attorney-General *v.* The Mayor, &c. of Dublin, 1 Bligh (N. S.) R. 312, 347, 348. See also Corporation of Ludlow *v.* Greenhouse, 1 Bligh (N. S.) R. 61, 62, 68.

² The Incorporated Society *v.* Richards, 1 Connor & Lawson, R. 58; S. C. 1 Drury & Warren, R. 258.

most satisfactory information upon the whole subject is to be found in the report of the Commissioners upon the Public Records published by Parliament in 1827. From this most important document, it appears, by a great number of cases previous to the statute, that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon and enforced in, the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as can be gathered from the records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take.¹

§ 1154 *c.* The subject has also of late years undergone a very elaborate discussion in the American courts, and especially in the Supreme Court of the United States, in the interesting and important case of *Mr. Girard's Will*, in which all the leading authorities were examined and criticised. In this case the court held that there was a jurisdiction in chancery over charitable trusts antecedent to the statute of Elizabeth, and that although the statute was never in force in Pennsylvania, yet that the common law of that State had always recognized the chancery jurisdiction in cases of charities.²

[* § 1154 *d.* The same rule is now recognized in most of the American States; and courts of equity, in most of them, take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if sufficiently certain to be intelligible; and without regard to the fact of the existence of a trustee capable of holding the legal estate. In some of the States, this is done upon the theory of the common-law jurisdiction of courts of equity over the subject; and in others, upon the ground, that the provisions of the statute of the 43 Eliz.* have been adopted as a portion of the common law in those

¹ 1 Cooper's Public Records, 355, Calendar of Proceedings in Chancery. See, also, *Vidal v. Girard's Executors*, 2 Howard, S. C. R. 155, 196.

² *Vidal, &c. v. Girard's Executors*, 2 Howard, S. C. R. 127. [See, also, on this subject, *Andrew v. N. Y. Bible and Prayer Book Society*, 4 Sandford, R. 156; *Wheeler v. Smith*, 9 How. S. C. R. 55; *Ayres v. Methodist Church*, 3 Sandford, S. C. R. 351; *McCord v. O'Chiltree*, 8 Blackf. 21; *Beall v. Fox*, 4 Georgia, R. 404; *Miller v. Chittenden*, 2 Clarke, 316; *Carter v. Balfour*, 19 Ala. 814; *Dickson v. Montgomery*, 1 Swan. 348; *Fontain v. Ravenel*, 17 How. 369; *Williams v. Williams*, 4 Seld. 525.]

States.¹ If there is no legal trustee, the court of equity will compel the heir to act as such until another be appointed by the court.²]

§ 1155. But however extensive the jurisdiction may originally have been over the subject of charities, and however large its application, it is very certain that, since the statute of Elizabeth, no bequests are deemed within the authority of chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which, by analogy, are deemed within its spirit and intendment.³
 . . A bequest may, in an enlarged sense, be charitable, and yet not within the purview of the statute. Charity, as Sir William Grant (the Master of the Rolls) has justly observed, in its widest sense, denotes all the good affections men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither of these senses is it employed in the Court of Chancery.⁴ In that court it means such charitable bequests only as are within the letter and the spirit of the statute of Elizabeth.

§ 1156. Therefore, where a testatrix bequeathed the residue of her personal estate to the Bishop of D., to dispose of the same "to such objects of benevolence and liberality as the bishop in his own discretion shall most approve of," and she appointed the bishop her executor; on a bill brought to establish the will, and declare the residuary bequest void, the bequest was held void, upon the ground, that objects of benevolence and liberality were not necessarily charitable within the statute of Elizabeth, and were, therefore, too indefinite to be executed. On that occasion, it was said by the court, that no case had yet been decided, in which the court had executed a charitable purpose, unless the will had contained a description of that which the law acknowl-

¹ [* *Burbank v. Whitney*, 24 Pick. R. 146; *Going v. Emery*, 16 Pick. 107; *Ex'rs of Burr v. Smith*, 7 Vt. R. 241; 1 *Jarman on Wills*, 197, and the learned note of Judge Perkins (edit. 1859), where the cases and authorities are extensively cited and thoroughly reviewed and analyzed.

² *Bartlett v. Nye*, 4 Met. R. 378; *McCartee v. Orphan Asylum Society*, 9 Cowen, 484, opinion of Chan. Jones; *Potter v. Chapin*, 6 Paige, R. 649, 650.]

³ See 2 *Roper on Legacies*, by White, ch. 19, § 1; p. 111, 112; *Nash v. Morley*, 5 Beavan, R. 177, 182, 183.

⁴ *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522; *Brown v. Yeall*, 7 Ves. 50, note (a); *Moggridge v. Thackwell*, 7 Ves. 36; *Attorney-General v. Bowyer*, 3 Ves. 714, 726; *Coxe v. Basset*, 3 Ves. 155; *Post*, § 1183; *Nightingale v. Goulburn*, 5 Hare, R. 485.

edged to be a charitable purpose, or had devoted the property to purposes of charity in general, in the sense in which that word is used in the Court of Chancery. The devise here was of a trust of so indefinite a nature, that it could not be under the control of the court; so that the administration of it could be reviewed by the court, or so that, if the trustee died, the court itself could execute the trust. It fell, therefore, within the rule of the court, that, where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking it shall be deemed a trustee, if not for those who were to take by the will, for those who are to take under the disposition of the law. And the residue was accordingly decreed to the next of kin.¹

§ 1156 *a*. Upon the like ground, a bequest of personalty to trustees to be applied "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," had been held void for vagueness and uncertainty, and as not being within the scope of the statute of Elizabeth.² [Otherwise, of a bequest of personalty to a certain Theological Seminary, which was unincorporated, "to continue a permanent fund; the interest to be applied to the education of pious indigent youths who are preparing for the ministry of the Gospel, and those only who adhere to the Westminster confession of faith." ³]

§ 1157. Upon the like principles, a bequest in these words: "In case there is any money remaining, I should wish it to be given in private charity," has been held inoperative; for the objects are too general and indefinite, not being within the statute of Elizabeth, and not being so ascertained, that the trust could be controlled or executed by a court of equity.⁴ So, a bequest to

¹ *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522; *Trustees of Baptist Association v. Hart's Executors*, 4 Wheat. 1, 33, 39, 43 to 45. See, also, *Galleo v. Attorney-General*, 3 Leigh, 450; *Wheeler v. Smith*, 9 Howard, 55; *Ante*, § 979 *a*, 1071 to 1073; *Post*, § 1183, 1197 *a*. [* See, also, *Chapman v. Brown*, 6 Vesey, 404.]

² *Kendall v. Granger*, 5 Beavan, R. 300. [But a bequest "to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain," has been held to be valid so far as related to the pure personalty, but void in respect of the personalty savoring of realty. *Nightingale v. Goulburn*, 5 Hare, R. 484.]

³ *McCord v. O'Chiltree*, 8 Black. 15.

⁴ *Ommaney v. Butcher*, 1 Turn. & Russ. 260, 270. See 2 Roper on Legacies, by White, ch. 19, § 6, p. 215 to 222; *Vesey v. Jamson*, 1 Sim. & Stu. 69; *Post*, § 1183.

trustees, to such charitable or public purpose or purposes, person or persons, as the trustees should, in their discretion, think fit, has been held void; for it is in effect a gift in trust, to be absolutely disposed of in any manner that the trustees might think fit, consistent with the laws of the land; which is too general and undefined to be executed.¹ So, a bequest for such benevolent, religious, and charitable purposes, as the trustees should, in their discretion, think most beneficial, has been held void, upon the ground of its generality, as it did not limit the gift to cases of charity, but extended it to those of benevolence also.² So, a bequest to executors, of a fund, to apply it to and for such charitable and other purposes as they shall think fit, without being accountable to any person for their disposition thereof, has been held void on account of its indefiniteness.³

§ 1158. So that it appears from these cases, that, since the statute of Elizabeth, the Court of Chancery will not establish any trusts for indefinite purposes of a benevolent nature, not charitable within the purview of that statute, although there is an existing trustee, in whom it is vested; but it will declare the trust void, and distribute the property among the next of kin. And yet, if there were an original jurisdiction in chancery over all bequests, charitable in their own nature, and not superstitious, to establish and regulate them, independent of the statute, it is not easy to perceive why an original bill might not be sustained in that court to establish such a bequest, especially where a trustee is interposed to effectuate it; for the statute does not contain any prohibition of such a bequest.

§ 1159. The statute itself begins by a recital, that lands, goods, money, &c., had been given, &c., heretofore, to certain purposes (which it enumerates in detail), which lands, &c., had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same. It then enacts, that it shall be lawful for the Lord Chancellor, &c., to

¹ *Vesey v. Jamson*, 1 Sim. & Stu. 69.

² *Williams v. Kershaw*, cited 1 Keen, R. 232. But where the bequest was for such religious and charitable purposes as the major part of the trustees should think proper, it was held to be a good bequest to charity within the statute of Elizabeth. *Baker v. Sutton*, 1 Keen, R. 224, 232, 233.

³ *Ellis v. Selby*, 1 Mylne & Craig, 286, 298, 299; *Ante*, § 979 a; *Post* § 1183.

award commission, under the great seal, to proper persons, to inquire, by juries of all and singular such gifts, &c., breaches of trusts, &c., in respect to such gifts, &c., heretofore given, &c., or which shall hereafter be given, &c., “to or for any the charitable and godly uses before rehearsed”; and, upon such inquiry, to set down such orders, judgments, and decrees, as the lands, &c. may be duly and faithfully employed to and for such charitable uses before rehearsed, for which they were given; “which orders, judgments, and decrees, not being contrary to the orders, statutes, or decrees of the donors and founders, shall stand firm and good, according to the tenor and purposes thereof; and shall be executed accordingly, until the same shall be undone and altered by the Lord Chancellor, &c., upon complaint by any party grieved, to be made to them.” Then follow several provisions, excepting certain cases from the operation of the statute, which are not now material to be considered. The statute then directs the orders, &c., of the commissioners to be returned, under seal, into the Court of Chancery, &c., and declares that the Lord Chancellor, &c. shall, and may, “take such orders for the due execution of all or any of the said judgments, orders, and decrees, as to them shall seem fit and convenient.” And, lastly, the statute enacts, that any person aggrieved with any such orders, &c., may complain to the Lord Chancellor, &c., for redress therein; and, upon such complaint, the Lord Chancellor, &c., may, by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof; “and upon hearing thereof, shall and may annul, diminish, alter, or enlarge the said orders, judgments, and decrees of the said commissioners, as to them shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof”; and may tax and award costs against the persons complaining, without just and sufficient cause, of the orders, judgments, and decrees before mentioned.¹

§ 1160. The uses enumerated in the preamble of the statute, as charitable, are gifts, devises, &c., for the relief of aged, impotent, and poor people; for maintenance of sick and maimed

¹ See the statute of 43d Elizabeth, ch. 4, at large, 2 Co. Inst. 707; Bridgman on Duke on Charit. ch. 1, pl. 1. These sections, from § 1143 to 1159, are taken almost literally from 3 Peters, R. App. 486 to 496.

soldiers and mariners; for schools of learning, free schools, and scholars of universities; for repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; for education and preferment of orphans; for, or towards the relief, stock, or maintenance for houses of correction; for marriages of poor maids; for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants, concerning payments of fifteenths, setting out of soldiers, and other taxes.¹ These are all the classes of uses which the statute in terms reaches.

§ 1161. From this summary statement of the contents of the statute, it is apparent that the authority conferred on the Court of Chancery, in relation to charitable uses, is very extensive; and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to say, in some instances, the most extravagant interpretation. It is very easy to perceive how it came to pass, that, as power was given to the court in the most unlimited terms, to annul, diminish, alter, or enlarge the orders and decrees of the commissioners, and to sustain an original bill in favor of any party aggrieved by such order or decree, the court arrived at the conclusion that it might, by original bill, do that in the first instance which it certainly could do circuitously upon the commission.² And as in some cases, where the trust was for a definite object, and the trustee living, the court might, upon its ordinary jurisdiction over trusts, compel an execution of it by an original bill, independent of the statute,³ we are at once let into the origin of the practice of mixing up the jurisdiction by original bill with the jurisdiction under the statute, which Lord Hardwicke alluded to in the passage already quoted,⁴ and which, at that time, was inveterately established. This mixture of the jurisdiction serves also to illustrate the remark of Lord Nottingham, in the case

¹ Ibid.; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, note (b).

² See *The Poor of St. Dunstan v. Beauchamp*, 1 Ch. Cas. 198; 2 Co. Inst. 711; *Bailiffs, &c. of Burford v. Lenthall*, 2 Atk. 551; 15 Ves. 305.

³ *Attorney-General v. Dixie*, 13 Ves. 519; *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305; *Green v. Rutherford*, 1 Ves. 462; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, 499; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (a); *Cooper, Eq. Pl.* 292.

⁴ *Bailiffs, &c. of Burford v. Lenthall*, 2 Atk. 520; *Ante*, § 1148.

already cited ;¹ where, upon an original bill, he decreed a devise to charity, void at law, to be good in equity, as an appointment ; although, before the statute of Elizabeth, no such decree could have been made.²

§ 1162. Upon the whole, it seems now to be the better opinion, that the jurisdiction of the Court of Chancery over charities, where no trust is interposed, or where there is no person *in esse*, capable of taking, or where the charity is of an indefinite nature, is to be referred to the general jurisdiction of that court, anterior to the statute of Elizabeth. This opinion is supported by the preponderating weight of the authorities, speaking to the point, and particularly by those of a very recent date, which appear to have been most thoroughly considered. The language, too, of the statute, lends a confirmation to this opinion, and enables us to trace what would otherwise seem a strange anomaly to a legitimate origin.³

§ 1163. Be this as it may, it is very certain that the Court of Chancery will now relieve by original bill or information upon gifts and bequests, within the statute of Elizabeth ; and informations by the attorney-general, to settle, establish, or direct such charitable donations, are very common in practice.⁴ Indeed, the mode of proceeding by commission under the statute of Elizabeth, has been long abandoned, and the mode of proceeding by information, by the attorney-general, is now become absolutely universal, so as to amount to a virtual extinguishment of the former remedy.⁵ But, where the gift is not a charity within the statute, no information lies in the name of the attorney-general to enforce it.⁶ And if an information is brought in the name of the attorney-general, and it appears to be such a charity as the court ought to support, although the information is mistaken in the title or in the prayer of relief, yet the bill will not be dismissed ; but the court will sup-

¹ Anon. 1 Ch. Cas. 267 ; *Ante*, § 1147.

² 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 2, note (d) ; *Ante*, § 1147.

³ [* This view is now very generally adopted in the United States, but with some exceptions. *Preachers' Aid Society v. Rich*, 45 Maine, R. 552, where the cases are very extensively cited and discussed.]

⁴ Com. Dig. *Chancery*, 2, N. 1. The proceedings by commission appear practically to have almost fallen into disuse. *Edin. Rev.* No. lxii. p. 383.

⁵ *Corporation of Ludlow v. Greenhouse*, 1 Bligh (N. S. R.), 61, 62, 68.

Attorney-General v. Hewer, 2 Vern. 387.

port it, and establish the charity in such manner as by law it may.¹ However, the jurisdiction of chancery over charities does not exist where there are local visitors appointed; for it then belongs to them and their heirs to visit and control the charity.²

§ 1164. We cannot review all the cases, but shall add³ a few words as to what charities come within the statute.⁴ It is clear,

¹ *Attorney-General v. Smart*, 1 Ves. 72; *Attorney-General v. Jeanes*, 1 Atk. 355; *Attorney-General v. Breton*, 2 Ves. 425; *Attorney-General v. Middleton*, 2 Ves. 327; *Attorney-General v. Parker*, 1 Ves. 43; S. C. 2 Atk. 576; *Attorney-General v. Whitely*, 11 Ves. 241, 247; *Ante*, § 1149.

² *Attorney-General v. Price*, 3 Atk. 108; *Attorney-General v. Governors of Harrow School*, 2 Ves. 552.

³ *Ante*, § 1155 to 1158.

⁴ They are enumerated with great particularity in *Duke on Charitable Uses*, by Bridgman; in *Com. Dig. Charitable Uses*; 2 *Roper on Legacies*, by White, ch. 19, § 1 to 5, p. 109 to 164. See, also, 2 *Fonbl. Eq. B. 2*, Pt. 2, ch. 1, § 1, note (b). [The following, amongst other bequests, have been held void as charitable gifts: "benevolent purposes," *James v. Allen*, 3 Mer. 17; "objects of benevolence and liberality," *Morice v. The Bishop of Durham*, 9 Vesey, 399, affirmed 10 Vesey, 521; "charitable or other purposes," *Ellis v. Selby*, 7 Simons, 352, and 1 Mylne & Cr. 286; "benevolent, charitable, and religious purposes," *Williams v. Kershaw*, 5 Law J. Rep. (N. S.) Chanc. 84, cited 1 Keen, 232, and 1 Myl. & Cr. 293, 298; "private charity," *Ommanny v. Butcher*, Turn. & Russ. 260; "for charitable or public purposes," or "to any person or persons," as his executors should think fit, *Vesey v. Jamson*, 1 Sim. & Stu. 69; "for such uses as trustees should think fit," *Fowler v. Garlike*, 1 Russ. & Myl. 232; "to such persons as trustees should think proper," *Gibbs v. Rumsey*, 2 Ves. & Beames, p. 295; "to buy such books as might have a tendency to promote the interests of virtue and religion, and the happiness of mankind, and distributing such books," *Browne v. Yeall*, 7 Ves. 50, note 76, p. 52, referred to in 9 Vesey, 406, 10 Vesey, 27; *Hargrave on the Thellusson Act*, 22, and 2 *Jurid. Ang.* 72, 162, 163; "£ 6,000 for a hospital, to increase till it amounted to [blank] for supporting [blank] boys," *Ewen v. Bannerman*, 2 Dow & Clark, 74; "to Roman Catholic priests, for prayers for the repose of the testatrix's soul," *West v. Shuttleworth*, 2 Myl. & K. 684; "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," *Kendall v. Granger*, 5 Beavan, 301; "to Roman Catholic bishops, and their successors," no such characters being known according to the laws of Ireland, *Attorney-General v. Power*, 1 Ball & B. 145; "for the maintenance of a Jeshuba, or assembly for reading the Jewish law, and advancing their holy religion," *Da Costa v. De Pas, Ambler*, 228, 2 Swan, 487 n., S. C. Dick. 258; "for the political restoration of the Jews to Jerusalem," *Habershon v. Vardon*, 7 Eng. Law & Eq. R. 228.

The following gifts have been held valid: "religious and charitable institutions and purposes," *Baker v. Sutton*, 1 Keen, 224; "benevolent and charitable purposes, with recommendation to apply it to domestic servants," *Miller v. Rowan*, 5 Cl. & Fin. 99, *Hill v. Burns*, cited 2 Dow & Cl. 101; "in the service of my Lord

that no superstitious uses are within the purview of it; such as are gifts of money for the finding or maintenance of a stipendiary and Master," *Powerscourt v. Powerscourt*, 1 Molloy, 616; "public and private charities, and to establish a life-boat," *Johnston v. Swan*, 3 Madd. 457; "to be distributed in charity, either to private individuals or public institutions," *Horde v. The Earl of Suffolk*, 2 Myl. & K. 59; "for promoting charitable purposes, as well of a public as of a private nature, and more especially in relieving distressed persons" (admitted), *Waldo v. Caley*, 16 Ves. 206; "to such charities as shall be deemed most useful by the executor of [one to whom the property mentioned was given for life]," *Wells v. Doane*, 3 Gray, 201; "to such charitable purposes as V. should appoint"; V. died in testator's lifetime, *Moggridge v. Thackwell*, 7 Ves. 39; "to such charitable purposes as I intend to name hereafter"; the testator named them not; *Mills v. Farmer*, 19 Ves. 482, 1 Mer. 55; "for the Welch circulating charity schools, and for the increase and improvement of Christian knowledge, and promoting religion as most conducive to the said charitable purposes, and moreover to buy Bibles and other religious books, to be divided amongst poor pious persons," *Attorney-General v. Stepney*, 10 Ves. 22; a bequest of the sum of £ 1,000 to poor housekeepers, as A. shall appoint, *Attorney-General v. Pearce*, 2 Atk. 87, and *Barnard Ch. C. 208*; legacy towards establishing a bishopric in America, *Attorney-General v. Bishop of Chester*, 1 Bro. C. C. 444; bequest of annual sum for repairs of a monument, *Willis v. Brown*, 2 Jurist, 987; bequest for the "perpetual endowment or maintenance of two schools," *Kirkbank v. Hudson*, 7 Price, 213; "to charitable and pious uses," *Attorney-General v. Herrick*, 2 Ambl. 712; to "the poor inhabitants of S., forever," *Attorney-General v. Clarke*, 1 Ambl. 422; legacy to the poor, *Attorney-General v. Rance*, cited 1 Ambl. 422; "to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of S.," *West v. Shuttleworth*, 2 Myl. & K. 684; "for the use of Roman Catholic priests in and near London," *Attorney-General v. Gladstone*, 13 Simons, 7; "charitable, beneficial, and public works," at Dacca, in Bengal, for the exclusive benefit of the native inhabitants, *Mitford v. Reynolds*, 1 Phillips, 185; "poor, pious persons, male and female," &c., *Nash v. Morley*, 5 Beav. 177; for erecting a hospital for persons "sick of the small-pox, or any other infectious distemper," *Attorney-General v. Kell*, 2 Beav. 575; a bequest "to ten worthy men, including some learned men, to purchase meat and wine fit for the service of the two nights of the Passover," *Straus v. Goldsmid*, 8 Simons, 614; bequest "to the widows and orphans of the parish of L.," *Attorney-General v. Comber*, 2 Sim. & Stu. 93; bequest for putting out "our poor relations" apprentices, *White v. White*, 7 Ves. 422; gift for and towards establishing a school in B., *Attorney-General v. Williams*, 4 Bro. C. C. p. 526; a bequest for preaching a sermon on Ascension-Day, for keeping the chimes of the church in repair, and for payment to be made to the singers in the gallery, *Turner v. Ogden*, 1 Coxe, 316; bequest for supplying water to the town of C., for the use of the inhabitants, *Jones v. Williams*, 2 Ambler, 651; a gift for the improvement of the city of Bath, *Howse v. Chapman*, 4 Ves. 542; gift for the improvement of the town of Bolton, *Attorney-General v. Heelis*, 2 Sim. & Stu. 67; gifts "for the benefit, advancement, and propagation of education and learning in every part of the world, as far as circumstances will permit," *Whicker v. Hume*, 14 Beav.; to the Chancellor of the

priest; or for the maintenance of an anniversary or obit; or of any light or lamp in any church or chapel; or for prayers for the dead; or for such purposes as the superior of a convent, or her successor, may judge expedient.¹ It is equally well settled, that all bequests which in a broad and comprehensive sense may be deemed charities, such as objects of benevolence, liberality, and expanded humanity, are not charities within the purview of the statute; but they must be within the specific enumeration of objects in the statute, to entitle them to be enforced in the Court of Chancery.² But there are certain uses which, though not within the strict letter, are yet deemed charitable within the equity of the statute. Such is money given to maintain a preaching minister; to maintain a schoolmaster in a parish; for the setting up of a hospital for the relief of poor people; for the building of a sessions house for a city or county; for the making of a new, or for the repairing of an old pulpit in a church; for the buying of a pulpit-cushion or pulpit-cloth; or for the setting of new bells, where there are none, or for mending of them, where they are out of order.³

[* § 1164 *a*. But a gift of a sum of money to be expended by the executors, in concurrence with the trustees of Shakespeare's House in Stratford, in forming a museum at said house, and for such other purposes as the executors should think fit and desirable, in order to effect the wishes of the testator, was held not to be a charitable gift, and to be void for uncertainty.⁴]

§ 1165. Charities are also so highly favored in the law, that

Exchequer, to be appropriated to the benefit and advantage of Great Britain, *Nightingale v. Goulburn*, 5 Hare, 484, and 2 Phillips, 594; to the parish of G. C., *West v. Knight*, 1 Ca. in Ch. 134; for purposes conducing to the good of the county of W. and the parish of L. especially, *The Attorney-General v. The Earl of Lonsdale*, 1 Simons, 105; and see *Attorney-General v. Mayor, &c. of Carlisle*, 1 Simons, 437; *Attorney-General v. Browne*, 1 Swan. 265; *Attorney-General v. The Mayor, &c. of Dublin*, 1 Bli. (N. S.) 312; *The Bishopric of Jerusalem*, 7 Eng. Law & Eq. R. 228. For the repair of a tomb, *Lloyd v. Lloyd*, 10 Eng. Law & Eq. R. 139.

¹ *Duke on Charit.* 105; *Bridgman on Duke on Charit.* 349, 466; *Adams v. Lambert*, 4 Co. Rep. 104; *Smart v. Prujean*, 6 Ves. Jr. 567.

² *Ante*, § 1155 to 1158.

³ *Duke on Charit.* 105, 113; *Bridgman on Duke on Charit.* 354; *Com. Dig. Charitable Uses*, N. 1; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (b); *Jeremy on Equity Jurisd.* B. 1, ch. 6, § 2, p. 238, 339.

⁴ [* *Thomson v. Shakespeare*, 6 Jur. N. S. 281; S. C. 6 Jur. N. S. 118.]

they have always received a more liberal construction than the law will allow in gifts to individuals.¹ In the first place, the same words in a will, when applied to individuals, may require a very different construction, when they are applied to the case of a charity. If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if, having appointed an executor, the latter dies in the lifetime of the testator, and no other person is appointed in his stead; in either of these cases, as these bequests are to individuals, the testator will be held intestate; and his next of kin will take the estate. But if a like bequest be given to the executor in favor of a charity, the Court of Chancery will, in both instances, supply the place of an executor, and carry into effect that very bequest, which, in the case of individuals, must have failed altogether.²

§ 1166. Again; in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed; or, if one being appointed, he dies in the testator's lifetime, and no other is appointed in his place; the bequest becomes a mere nullity. Yet such a bequest, if expressed to be for a charity, would be good; and the Court of Chancery would, in such a case, assume the office of an executor, and execute it.³ So, if a legacy is given to trustees to distribute in charity, and they all die in the testator's lifetime; although the legacy becomes thus lapsed at law (and if the trustees had taken to their own use, it would have been gone forever), yet it will be enforced in equity.⁴

§ 1167. Again; although in carrying into execution a bequest to an individual, the mode, in which the legacy is to take effect, is deemed to be of the substance of the legacy; yet, where the legacy is to a charity, the Court of Chancery will consider charity as the substance; and in such cases, and in such cases only, if the mode

¹ 2 Roper on Legacies, by White, ch. 19, § 5, p. 164 to 222.

² *Mills v. Farmer*, 1 Meriv. R. 55, 96; *Moggridge v. Thackwell*, 7 Ves. 36.

³ *Mills v. Farmer*, 1 Meriv. R. 55, 94; *Moggridge v. Thackwell*, 7 Ves. 37; *Attorney-General v. Jackson*, 11 Ves. 365, 367.

⁴ *Attorney-General v. Hickman*, 2 Eq. Cas. Abr. 193; *S. C. Bridgman on Duke on Charit.* 476; *Moggridge v. Thackwell*, 3 Bro. Ch. Cas. 517; *S. C. 1 Ves. Jr.* 464; *S. C. 7 Ves.* 36; *Mills v. Farmer*, 1 Meriv. 55, 100; *McCord v. O'Chiltree*, 8 Blackf. 22; *Winslow v. Cummings*, 3 Cush. 365; *Brown v. Kelsey*, 2 Cush. 243; *White v. White*, 1 Bro. Ch. Cas. 12.

pointed out fail, it will provide another mode, by which the charity may take effect, but by which no other charitable legatees can take.¹ A still stronger case is, that, if the testator has expressed an absolute intention to give a legacy to charitable purposes, but he has left uncertain, or to some future act, the mode by which it is to be carried into effect; there, the Court of Chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity.² Therefore, it has been held, that, if a man devises a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, or by a note in writing, and he afterwards leaves no direction by note or codicil, the Court of Chancery will dispose of it, to such charitable purposes as it thinks fit.³ So, if a testator bequeaths a sum for such a school as he shall appoint, and he appoints none, the Court of Chancery may apply it for what school it pleases.⁴

§ 1168. The doctrine has been pressed yet farther; and it has been established, that, if the bequest indicate a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some other charity, agreeably to the law, in the room of that contrary to it.⁵ Thus, a sum of money bequeathed to found a Jews' synagogue has been enforced by the Court of Chancery as a charity, and judicially transferred to the benefit of a foundling hospital!⁶ And a bequest for the education

¹ *Mills v. Farmer*, 1 Meriv. R. 55, 100; *Moggridge v. Thackwell*, 7 Ves. 36; *Attorney-General v. Berryman*, 1 Dickens, 168; *Denyer v. Druce*, 1 Tamlyn, R. 32; 2 Roper on Legacies, by White, ch. 19, § 5, art. 3. p. 175 to 181; *Attorney-General v. Ironmongers' Company*, 1 Craig & Phillips, 208, 222, 225; S. C. 2 Beavan, R. 313; *Post*, § 1170 a; *Attorney-General v. The Coopers' Company*, 3 Beavan, R. 29; *Attorney-General v. The Drapers' Company*, 2 Beavan, R. 508; *Post*, § 1178, 1181.

² *Mills v. Farmer*, 1 Meriv. R. 55, 95; *Moggridge v. Thackwell*, 7 Ves. 36; *White v. White*, 1 Bro. Ch. Cas. 12.

³ *Attorney-General v. Syderfin*, 1 Vern. 224; S. C. 2 Freem. R. 261, and recognized in *Mills v. Farmer*, 1 Meriv. R. 55, and *Moggridge v. Thackwell*, 7 Ves. 36, 37.

⁴ 2 Freem. R. 261; *Moggridge v. Thackwell*, 7 Ves. 36, 73, 74.

⁵ *De Costa v. De Pas*, 1 Vern. 251; *Attorney-General v. Guise*, 2 Vern. 266; *Cary v. Abbot*, 7 Ves. 490; *Moggridge v. Thackwell*, 7 Ves. 36, 75; *Bridgman on Duke on Charit. Uses*, 466; *De Themmines v. DeBonneval*, 5 Russ. R. 288, 292; *Attorney-General v. Power*, 1 B. & Beatt. 145.

⁶ *Id.*, and *Mills v. Farmer*, 1 Meriv. R. 55, 100; *Post*, § 1182.

of poor children in the Roman Catholic faith, has been decreed in chancery to be disposed of by the king at his pleasure under his sign-manual.¹

§ 1169. Another principle, equally well established, is, that, if the bequest be for charity, it matters not how uncertain the persons or the objects may be; or whether the persons, who are to take, are *in esse*, or not; or whether the legatee be a corporation capable in law of taking or not; or whether the bequest can be carried into exact execution or not; for, in all these and the like cases, the court will sustain the legacy, and give it effect according to its own principles.² And where a literal execution becomes inexpedient or impracticable, the court will execute it, as nearly as it can, according to the original purpose, or (as the technical expression is) *cy pres*.³ This doctrine seems to have been borrowed from the Roman law; for by that law, donations for public purposes were sustained and were applied, when illegal *cy pres*, to other purposes, at least one hundred years before Christianity became the religion of the empire.⁴

§ 1170. Thus, a devise of lands to the church-wardens of a parish (who are not a corporation capable of holding lands), for a charitable purpose, although void at law, will be sustained in equity.⁵ So, if a corporation, for whose use a charity is designed, is not *in esse* and cannot come into existence, but by some future

¹ Cary v. Abbot, 7 Ves. 490; De Themmines v. De Bonneval, 5 Russ. R. 292; Trustees of Baptist Association v. Smith, 4 Wheat. R. 1; S. C. 3 Peters, R. App. 481 to 485.

² Post, § 1181; Gower v. Mainwaring, 2 Ves. 87, 89, per Lord Hardwicke; Winslow v. Cummings, 3 Cush. 365; Tucker v. Seaman's Aid Society, 7 Met. 195. [* See also Preachers' Aid Society v. Rich, 45 Maine, R. 552; Tappan v. Deblois, Id. 122.]

³ Attorney-General v. Oglander, 3 Bro. Ch. Cas. 166; Attorney-General v. Green, 2 Bro. Ch. Cas. 492; Frier v. Peacock, Rep. Temp. Finch, 245; Attorney-General v. Boulton, 2 Ves. Jr. 380; Bridgman on Duke on Charit. Uses, 355; Baptist Association v. Hart's Ex'rs, 4 Wheat. R. 1; S. C. 3 Peters, R. App. 481; Ingles v. Trustees of Sailors' Snug Harbor, 3 Peters, R. 99; Attorney-General v. Wansay, 15 Ves. 232. See Trustees of Baptist Association v. Smith, 4 Wheat. R. 1, 39, 43; Ante, § 1074; Post, § 1176.

⁴ Per. Ld. Ch. Justice Wilmot, Wilmot's Notes, p. 53, 54, citing Dig. Lib. 33, tit. 2, § 16, 17, *De Usu et Usufructu Legatorum*.

⁵ 1 Burn, Ecc. Law, 226; Duke, 33, 115; Com. Dig. Chancery, 2, N. 2; Attorney-General v. Combe, 2 Ch. Cas. 13; Rivett's case, Moore, 890; Attorney-General v. Bowyer, 3 Ves. Jr. 714; West v. Knight, 1 Ch. Cas. 135; Highmore on Mortm. 204; Tothill, 34; Mills v. Farmer, 1 Meriv. R. 55.

act of the crown, as, for instance, a gift to found a new college, which requires an act of incorporation, the gift will be held valid, and the court will execute it.¹ So, if a devise be to an existing corporation by a misnomer, which makes it void at law, it will be held good in equity.² So, where a devise was to the poor generally, the court decreed it to be executed in favor of three public charities in London.³ So, a legacy towards establishing a bishop in America, was held good, although none was yet appointed.⁴ So, where a bequest of £ 1,000 was "to the Jews' Poor, Mile End," and there were two charitable institutions for Jews at Mile End, it not appearing which of the charities was meant, the court held, that the fund ought to be applied *cy pres*, and divided the bequest between the two institutions.⁵

§ 1170 *a.* And where a charity is so given that there can be no objects, the court will order a new scheme to execute it. But if objects may, though they do not at present exist, the court will keep the fund for the old scheme.⁶ And when the specified objects cease to exist, the court will new model the charity.⁷ Thus, where there was a bequest of the residue of the testator's estate to a company, to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one fourth to charity schools in London and its suburbs, and one fourth towards necessitated freemen of the company; there being no British slaves in Turkey or Barbary to redeem, the court directed a master to approve of a new scheme *cy pres*; and in that case, it further approved a scheme, to give the moiety of the charities to the other fourth parts, which were bequeathed.⁸

¹ *White v. White*, 1 Bro. Ch. Cas. 12; *Attorney-General v. Downing*, Ambl. R. 550, 571; *Attorney-General v. Bowyer*, 3 Ves. Jr. 714, 727; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Peters, 99.

² *Anon.* 1 Ch. Cas. 267; *Attorney-General v. Plat.* Rep. Temp. Finch, 221; *Minot v. Boston Asylum*, 7 Met. 417; *Tucker v. Seamen's Aid Society*, Id. 188; *Winslow v. Cummings*, 3 Cush. 359.

³ *Attorney-General v. Peacock*, Rep. Temp. Finch, 245; *Owens v. Bean*, Id. 395; *Attorney-General v. Syderfin*, 1 Vern. 224; *Clifford v. Francis*, 1 Freem. R. 330.

⁴ *Attorney-General v. Bishop of Chester*, 1 Bro. Ch. Cas. 444.

⁵ *Bennett v. Hayter*, 2 Beavan, R. 81.

⁶ *Attorney-General v. Oglander*, 3 Bro. Ch. Cas. 166.

⁷ *Attorney-General v. City of London*, 3 Bro. Ch. Cas. 171; S. C. 1 Ves. Jr. 243.

⁸ *Attorney-General v. The Ironmongers' Company*, 2 Beavan, R. 313. On

§ 1171. In further aid of charities, the court will supply all defects of conveyances, where the donor hath a capacity, and a dis-

this occasion, Lord Langdale said : “ With respect to the order of reference, it is now necessary that some construction should be given to it, and I am of opinion, that the master was bound to consider whether there could be a *cy pres* application for the first purpose, before he proceeded to consider the propriety of the application to the second purpose. But, then, I am by no means of opinion, that he was bound to consider it precisely in the same manner as he would have been bound to do if there had been no other charitable purpose mentioned in the will. Where a fund is to be disposed of *cy pres*, the court, for the sake of making a disposition, is bound to act upon the suggestions which are before it, however remote, and it is rather astute in ascertaining some application in conformity more or less with the intention of the testator. The case, however, is different where there are other charitable purposes mentioned in the testator's will itself, and in which a comparison may be instituted between the probability of the testator resorting to something very remote from his original intention, and something far less remote from the other objects, which are specifically mentioned in the will. I quite agree with the view, which has been taken upon the subject in the argument,—that, if it could have been found that there was a clear and close approximation to any purpose analogous to the first, that the master ought to have preferred it to the second and third, distinctly mentioned in the will ; but if such approximation were so remote that there would be very great difficulty in making out the similarity, and it appeared probable, that, if the subject had been in the contemplation of the testator, he would have preferred the other two objects mentioned in his will, then, I think, it became the duty of the master to look to those second objects and lay aside the first.” This decree was varied upon appeal by Lord Cottenham, 1 Craig & Phillips, 508, 522. On this occasion, his lordship said : “ It is obviously true, that, if several charities be named in a will, and one fail for want of objects, one of the others may be found to be *cy pres* to that which has failed ; and, if so, its being approved by the testator ought to be an additional recommendation ; but such other charity ought not, as I conceive, to be preferred to some other more nearly resembling that which has failed. That point, however, is not open upon the present report, which was made under an order directing the master, in settling a scheme, to have a regard, as near as may be, to the intention of the testator as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the said will. By this I understand, that the first subject to be considered is, intention of the testator, to be discovered from the gift in favor of British slaves ; subordinately to which, and, if possible, consistently with it, the other charities are to be considered ; and this, I conceive, would have been the course to be pursued, if there had not been any such special directions. Assuming this to be the rule, it appears, that the first charity is most general in its objects, being applicable to all British persons who should happen to be in a particular situation ; and the second is limited to persons in London and its suburbs ; and that the third is confined to freemen of a particular company in London. It would seem, therefore, that, although there is no possibility of benefiting the British community at large in the mode intended by the testator, none being found in the situation he anticipated, it would yet be

posable estate, and his mode of donation does not contravene the provisions of any statute.¹ The doctrine is laid down with great

more consistent with his intention, that the same community should enjoy the benefit of his gift in any other way, than that it should be confined to any restricted portion of such community. In considering the manner in which such benefit should be conferred, it is very reasonable and proper to look to other provisions in his will in order to see whether he has indicated any preference to any particular mode of administering charity. If a testator had given part of his property to support hospitals for leprosy in any part of England, and another part to a particular hospital, it would be reasonable to adopt the support of hospitals as the mode of applying the disposable funds; but there would not be any ground for giving the whole to the particular hospital. The only case referred to, as giving any countenance to such a principle, is the unreported case of Attorney-General *v.* Bishop of Llandaff, cited 2 Mylne & Keen, 586, and stated in the master's report in Attorney-General *v.* Gibson, dated 23d of July, 1845. (See this case mentioned in 2 Beavan, R. 517, n.) It is, however, to be observed, that there is no appearance of that case having been discussed; and that the trust, which failed, was as unlimited as to the description of slaves as the present; and that the scheme may have been adopted, upon the principle I act upon in adopting the second gift, in this testator's will, as indicative of his preference for a particular charity; and, therefore, to be preferred in the absence of any other more resembling the object of that, which has failed. It may also be observed, that the scholarships in that case appear to have been open to every description of candidate. If Lord Eldon had thought this the correct principle to act upon, he would, in *Mills v. Farmer* (19 Ves. 483), have given the whole funds to the two charities named, instead of referring it to the master, to approve of a scheme for distributing the funds; having regard, it is true, to those two objects named, which was proper for the purpose of ascertaining what description of charity was most likely to be in conformity with the views of the testator. To assume, because a testator names two charities in his will, that he would have given the amount of both legacies to one, if he had foreseen that the other could not be carried into effect, and, therefore, to give the provision intended for the object, which fails, to the other, is, or may be, totally inconsistent with the doctrine of *cy pres*. The two objects may be wholly unconnected; and there may be other charities closely connected with that which the testator intended to favor; but as indicative of the testator's general views and intentions, it may be very proper to observe the course he has pursued in his gifts to other charities. I think, therefore, that, in the absence of any objects bearing any resemblance to the object which has failed, it is very proper to look to the second gift, but only as a guide to lead to what the testator would probably have done himself, and, therefore, not to be followed further than may be proper to attain that object; but with regard to the third

¹ Case of Christ's College, 1 W. Bl. 90; Attorney-General *v.* Rye, 2 Vern. 453, and Raithby's notes; Rivett's case, Moore, 890; Attorney-General *v.* Burdet, 2 Vern. 755; Attorney-General *v.* Bowyer, 3 Ves. Jr. 714; Damus's case, Moore, 822; Collison's case, Hob. 136; *Mills v. Farmer*, 1 Meriv. R. 55; Attorney-General *v.* Bowyer, 3 Ves. Jr. 714; 1 Drury & Warren, R. 308.

accuracy by Duke,¹ who says, that a disposition of lands, &c., to charitable uses is good, "albeit there be defect in the deed, or in the will, by which they were first created and raised; either in the party trusted with the use, where he is misnamed, or the like; or in the party or parties for whose use, or that are to have the benefit of the use; or where they are not well named, or the like; or in the execution of the estate, as where livery of seisin or attornment is wanting, or the like. And, therefore, if a copyhold doth dispose of copyhold land to a charitable use without a surrender; or a tenant in tail convey land to a charitable use without a fine; or a reversion without attornment or insolvency; and in divers such like cases, &c., this statute shall supply all the defects of assurance; for these are good appointments within the statute."²

object, I cannot see any grounds for considering it as indicative of the testator's general views, or any reason for supposing that he would, under any circumstances, have wished that provision increased. The objects are restricted within the narrowest limits; and it is, in that respect, in direct contrast with the extended nature of the first gift; but what appears to me to be conclusive against any reference to the third gift, is, that the testator has expressed his reasons for the gift, which can have no application to the moiety undisposed of. He says that the third gift is in consideration of the company's 'care and pains in the execution of his will.' It is true, that this compensation is given to the company in the shape of a provision for necessitous decayed freemen of the company, their widows and children, and, no doubt, is a charity; but, in looking for evidence of the testator's general views and intentions, with reference to the kind of charities to be favored, it cannot be inferred that he preferred the distressed freemen of the company to all others because he made a provision for them as a consideration for services to be performed by the company; and this consideration has already increased in a greater ratio than the income of the property; it being well known, that a large property may be administered at a less percentage than a small one. I am, therefore, of opinion, that this third gift cannot be referred to, for any purpose, in settling a scheme for the application *cy pres* of the funds intended for the first; but, I think, the most reasonable course to be adopted is, to look at the second gift as indicative of the kind of charity preferred by the testator, but making it as general in its application as the first was intended to be, that is, open to all who might stand in need of its assistance; which leads to this conclusion, that it should be applied in support of charity schools, without any restriction as to place, where the education is according to the Church of England, but not to exceed £ 20 per year to any one."

¹ Duke on Charit. Uses, 84, 85; Bridgman on Duke on Charit. Uses, 355.

² Duke on Charit. Uses, 84, 85; Bridg. on Duke on Charit. Uses, 355; Christ's Hospital v. Hawes, Bridgman on Duke on Charit. Uses, 371; 1 Burn's Eccl. Law, 226; Tuffnell v. Page, 2 Atk. 37; Tay v. Slaughter, Prec. Ch. 16; Attorney-General v. Rye, 2 Vern. 453; Rivett's case, Moore, 890; Kenson's case, Hob. 136; Attorney-General v. Burdet, 2 Rern. R. 755; 1 Drury & Warren, R. 308.

But a parol devise to charity out of lands being defective as a will, which is the manner of the conveyance, which the testator intended to pass it by, can have no effect, as an appointment, which he did not intend.¹ Yet it has, nevertheless, been held, where a married woman, administratrix of her husband, and entitled to certain personal estates belonging to him (namely, a *chose in action*), afterwards intermarried, and then, during coverture, made a will, disposing of that estate, partly to his heirs, and partly to charity, that the bequest, although void at law, was good as an appointment under the statute of Elizabeth, for this reason, "that the goods in the hands of administrators are all for charitable uses; and the office of the ordinary, and of the administrator, is, to employ them to pious uses; and the kindred and children have no property nor pre-eminence but under the title of charity."²

§ 1172. With the same view, the Court of Chancery was, in former times, most astute to find out grounds to sustain charitable bequests. Thus, an appointment to charitable uses under a will, that was precedent to the statute of Elizabeth, and so was utterly void, was held to be made good by the statute.³ So, a devise, which was not within the statute, was nevertheless decreed as a charity, and governed in a manner wholly different from that contemplated by the testator, although there was nothing unlawful in his intent; the Lord Chancellor giving as his reason, *Summa est ratio, quæ pro religione facit*.⁴ So, where the charity was for a weekly sermon, to be preached by a person to be chosen by the greatest part of the best inhabitants of the parish, it was treated as a wild direction; and a decree was made, that the bequests should be to maintain a catechist in the parish, to be approved by the bishop.⁵

§ 1173. So, although the statute of wills of Henry VIII. did not allow devises of lands to corporations to be good, yet such devises to corporations for charitable uses were held good, as appointments under the statute of Elizabeth.⁶ Lord Chancellor Cowper, in a case where he was called upon to declare a chari-

¹ Jennor v. Harper, Prec. Ch. 389; 1 Burn's Eccl. Law, 226. And see Attorney-General v. Bains, Prec. Ch. 271.

² Damus's case, Moore, 822.

³ Smith v. Stowell, 1 Ch. Cas. 195; Collison's case, Hob. R. 136.

⁴ Attorney-General v. Combe, 2 Ch. Cas. 18.

⁵ Ibid.

⁶ Griffith Flood's case, Hob. 136.

table bequest valid, notwithstanding the will was not executed according to the statute of frauds, and in which these cases were cited, observed: "I shall be very loath to break in upon the statute of frauds and perjuries in this case, as there are no instances where men are so easily imposed upon, as the time of their dying, under the pretence of charity." — "It is true, the charity of judges has carried several cases on the statute of Elizabeth to great lengths; and this occasioned the distinction between operating by will and by appointment, which, surely, the makers of that statute never contemplated."¹

§ 1174. It has been already intimated, that the disposition of modern judges has been, to curb this excessive latitude of construction, assumed by the Court of Chancery in early times.² But, however strange some of the doctrines already stated may seem to us, as they have seemed to Lord Eldon; yet they cannot now be shaken without doing that (as he has said), in effect, which no judge will avowedly take upon himself to do, to reverse decisions that have been acted upon for centuries.³

§ 1175. A charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heir of the donor and the donees.⁴ And where several distinct charities are given to a parish for several purposes, no agreement of the parishioners can alter or divert them to any other uses.⁵

§ 1176. The doctrine of *cy pres*, as applied to charities, was formerly pushed to a most extravagant length.⁶ But this sensible distinction now prevails, that the court will not decree the execution of the trust of a charity in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed. In that case another mode will be adopted, consistent with the general intention; so as to execute it, although

¹ Att'y-General v. Bains, Prec. Ch. 271. And see Adlington v. Cann, 3 Atk. 141.

² See Harvard College v. Society for promoting Education, 3 Gray, 283.

³ Moggridge v. Thackwell, 7 Ves. 36, 87.

⁴ Attorney-General v. Platt, Rep. Temp. Finch. 221. And see Margaret and Regius Professors in Cambridge, 1 Vern. 55.

⁵ Mann v. Ballet, 1 Vern. 43; 1 Eq. Abr. 99, pl. 4. And see Attorney-General v. Gleg, 1 Atk. 356; Ambl. 373.

⁶ Attorney-General v. Minshall, 4 Ves.-Jr. 11, 14; Attorney-General v. Whitchurch, 3 Ves. Jr. 141; *Ante*, § 1168 to 1171.

not in mode, yet in substance. If the mode should become by subsequent circumstances impossible, the general object is not to be defeated, if it can in any other way be obtained.¹ Where there are no objects remaining, to take the benefit of a charitable corporation, the court will dispose of its revenues by a new scheme, upon the principle of the original charities, *cy pres*. A new scheme will not, however, be ordered, if the institution is a permanent one, and the object of the testator was to benefit that institution generally, although the particular trustee named may have died in the lifetime of the testator; but the legacy will be ordered to be paid over to the proper officer of the institution.²

§ 1177. The general rule is, that, if lands are given to a corporation for any charitable uses, which the donor contemplates to last forever, the heir never can have the land back again. But if it should become impracticable to execute the charity as expressed, another similar charity will be substituted, so long as the corporation exists.³ If the charity does not fail, but the trustees or corporation fail, the Court of Chancery will substitute itself in their stead, and thus carry on the charity.⁴

§ 1178. When the increased revenues of a charity extend beyond the original objects, the general rule as to the application of such increased revenues is, that they are not a resulting trust for the heirs at law; but they are to be applied to similar charitable purposes, and to the augmentation of the benefits of the charity.⁵

¹ Attorney-General v. Boulton, 2 Ves. Jr. 380, 387; S. C. 3 Ves. Jr. 220; Attorney-General v. Whitchurch, 3 Ves. Jr. 141; Attorney-General v. Stepney, 10 Ves. 22; Attorney-General v. Ironmongers' Company, 2 Mylne & Keen, 576, 586, 588; S. C. 1 Craig & Phillips, 220, 227; S. C. 2 Beavan, R. 313; Attorney-General v. The Coopers' Co. 3 Beavan, R. 29; Attorney-General v. The Drapers' Co. 2 Beavan, R. 508; Martin v. Maughan, 14 Simons, R. 230; *Ante*, § 1167, 1170.

² Walsh v. Gladstone, 1 Phillips, Ch. R. 290.

³ Attorney-General v. Wilson, 3 Mylne & Keen, 362, 372.

⁴ Attorney-General v. Hicks, High. on Mortmain, 336, 353, &c.

⁵ Attorney-General v. Earl of Winchelsea, 4 Bro. Ch. Cas. 373; High. on Mortm. 187, 327; *Ex parte Jortin*, 7 Ves. 340; Attorney-General v. Mayor of Bristol, 2 Jac. & Walk. 321; Attorney-General v. Dixie, 2 Mylne & Keen, 342; Attorney-General v. Haberdashers' Co. 3 Russ. 530; Bridgman on Duke on Charit. Uses, 588; Attorney-General v. Hurst, 2 Cox, R. 364; Attorney-General v. Wilson, 3 Mylne & Keen, 362, 372; Attorney-General v. The Ironmongers' Company, 2 Mylne & Keen, 576, 586, 588; S. C. 2 Beavan, R. 313; 1 Craig & Phillips, 220,

[* § 1178 *a*. In a recent case¹ upon appeal before the Lords Justices, the subject of the construction, and the administration, of charities is very much discussed; and the rule adopted, that an administration which produces no adequate results is not a proper one, and that a construction which departs from the plain import of the trust cannot be adopted by the court, although supported by the former action of the court, where the question did not directly arise. But a court of equity will not transfer the administration of a charity to a new trustee, unless there is proof of incapacity, or unfaithfulness, in the trustee named in the gift; or where there has occurred a failure of the objects of the charity.²]

§ 1179. In former times, the disposition of chancery to assist charities was so strong, that in equity the assets of the testator were held bound to satisfy charitable uses before debts or legacies; although at law the assets were held bound to satisfy debts before charities. But, even at law, charities were then preferred to other legacies.³ And this, indeed, was in conformity to the civil law, by which charitable legacies are preferred to all others.⁴ This doctrine, however, is now altered; and charitable legacies, in case of a deficiency of assets, abate in proportion, as well as other pecuniary legacies.⁵

§ 1180. Courts of equity have, in modern times, also shown a disinclination to marshal the testator's assets, in favor of any charitable bequests, given out of a mixed fund of real and personal estate, without any distinction whether the real estate were freehold or leasehold estate, or pure personal estate, or mixed personal estate, and whether these bequests have been particular, or residuary, by refusing to direct the debts and other legacies to be paid out of the real estate, and reserving the personal to fulfil the charity, although the charity would be void as to the real estate.⁶

227; *Attorney-General v. The Drapers' Company*, 2 Beavan, R. 508; *Attorney-General v. The Coopers' Company*, 3 Beavan, R. 29; *Ante*, § 1170, 1267; *Post*, § 1181; [* *Ashton's Charity, in re*, 5 Jur. N. S. 665.

¹ *Attorney-General v. The Corporation of Rochester*, 5 De G. M. & G. 797; *Same v. The Corporation of Beverly*, 6 De G. M. & G. 256.

² *Harvard College v. Society for Promoting Theol. Education*, 3 Gray, R. 280.]

³ High. on Mortm. 67; Swinb. on Wills, Pt. 1, § 16, p. 72.

⁴ *Fielding v. Bound*, 1 Vern. 230.

⁵ *Id.* and Raithby's note (2).

⁶ High. on Mortm. 355; 1 Roper on Legacies, by White, ch. 15, § 6, p. 835; *Mogg v. Hodges*, 2 Ves. 52; *Middleton v. Spicer*, 1 Bro. Ch. R. 201; *Ridges v.*

So that, in effect, the court appropriates the fund as if no legal objection existed to applying any part of it to the charity bequests, and then holds, that so much of these bequests fail as would in that way be to be paid out of the prohibited fund.¹ The ground of this doctrine is said to be, that a court of equity is not warranted to set up a rule of equity, contrary to the common rules of the court, merely to support a bequest which might otherwise be contrary to law. Formerly, indeed, a different rule prevailed, and a marshalling of the assets was allowed in favor of charities; so that, where there were general legacies, and the testator had charged his estate with the payment of all his legacies, if the personal estate were not sufficient to pay the whole, the court will direct the charity to be paid out of the real estate, so that the will might be performed *in toto*.²

§ 1180 a. But the modern decisions have completely overturned the old rule, whether wisely or not, it is perhaps too late to inquire. The present doctrine has proceeded a step further, and where there is a fund of pure personalty and mixed personalty, both applicable to the payment of debts and legacies, and the charitable legacies are charged on the pure personalty, and the other legacies and debts are charged on the remainder of the fund, if there is a deficiency of the assets to pay all the debts and legacies, the charity legacies are held to have failed in the proportion of the mixed personalty to the pure personalty. Therefore, where the testator directed the charity legacies to be paid out of his pure personal estate, and not out of his leasehold or other real estates, and by the same will charged his leasehold estates with the payment of his debts, and funeral and testamentary expenses and legacies not given to charities; and the pure personalty was insuffi-

Morrison, 1 Coxe, R. 180; Walker v. Childs, Ambler, R. 524; Foster v. Blagnen, Ambler, 704; Makeham v. Hooper, 4 Bro. Ch. R. 153; Attorney-General v. Earl of Winchelsea, 3 Bro. Ch. R. 380, and Belt's note (3); Attorney-General v. Hurst, 2 Coxe, R. 360; Attorney-General v. Tyndall, 2 Eden, R. 209, 210; Attorney-General v. Caldwell, Ambler, R. 635; Curtis v. Hutton, 14 Ves. 537; Hobson v. Blackburn, 1 Keen, R. 273; Williams v. Kershaw, Id. 274, note; Shelford on Mortmain, 234; *Ante*, § 569; The Philanthropic Society v. Kemp, 4 Beavan, R. 581.

¹ Williams v. Kershaw, 1 Keen, R. 274, note.

² Attorney-General v. Graves, Ambl. R. 158, and Mr. Blunt's notes (2), (3); Arnold v. Chapman, 1 Ves. 108; Attorney-General v. Tyndall, 2 Eden, R. 211; Attorney-General v. Tompkins, Ambl. R. 217.

cient to pay the debts, expenses, and legacies, the court refused to marshal the assets so as to charge the leasehold estates with the debts, expenses, or charities, not charitable, but held that the charity legacies failed in the proportion of the mixed personalty to the pure personalty.¹

§ 1181. It has been already stated, that charitable bequests are not void on account of any uncertainty as to the persons or as to the objects to which they are to be applied.² Almost all the cases on this subject have been collected, compared, and commented on by Lord Eldon, with his usual diligence and ability, in two recent decisions. The result of these decisions is, that, if the testator has manifested a general intention to give to charity, the failure of the particular mode, by which the charity is to be effected, will not destroy the charity. For the substantial intention being charity, equity will substitute another mode of devoting the property to charitable purposes, although the formal intention, as to the mode, cannot be accomplished.³ The same principle is applied, when

¹ *The Philanthropic Society v. Kemp*, 4 Beavan, R. 581.

² *Ante*, § 1169. [*And a gift of land to A., in trust out of the rents to keep in repair the houses and buildings thereon, and to have it in readiness as a Pest-House Field, for the reception of poor plague-patients during their sickness, and for a burial-place for such as deceased, was held to be a valid charity, and that no resulting trust was thereby created, in the mean while, in favor of the donor or his heirs, though the plague had not reappeared in England for more than one hundred and eighty years. *Attorney-General v. The Earl of Craven*, 21 Beavan, 392. And a bequest to trustees for the benefit of a Roman Catholic congregation, by one who had become a nun and gone into a convent abroad, was maintained. *Metcalfé in re*, 10 Jur. N. S. 287, before the Court of Chancery Appeal, S. C. 2 De G. J. & S. 122.]

³ The first was the case of *Moggridge v. Thackwell*, 7 Ves. R. 36, where the testator gave the residue of her personal estate to James Vaston, his executors and administrators, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters," and appointed Mr. Vaston one of her executors. Mr. Vaston died in her lifetime, of which she had notice; but the will remained unaltered. The next of kin claimed the residue, as being lapsed by the death of Mr. Vaston; but the bequest was held valid, and established. In the next case, *Mills v. Farmer*, 1 Meriv. R. 55, the testator, by his will, after giving several legacies, proceeded, "the rest and residue of all my effects I direct may be provided for promoting the Gospel in foreign parts, and in England; for bringing up ministers in different seminaries, and other charitable purposes, as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." The bill was filed by the next of kin, praying an account and distribution of the residue, as being undisposed of by the will or any codicil of the testator. The Master of the Rolls

the persons or objects of the charity are uncertain, or indefinite, if the predominant intention of the testator is still to devote the property to charity.¹ [Thus, where there was a bequest to the governors of a society for the “increase and encouragement of good servants,” and no such institution could be found, it was held that the gift was charitable, and did not fail.²] In like manner, if the original funds are more than sufficient for the specified objects of charity, the surplus will be applied to other similar purposes,³ [* or given to the donee, if that be a charitable institution, to apply in its discretion.⁴]

§ 1182. All these doctrines proceed upon the same ground, that is, the duty of the court to effectuate the general intention of the testator.⁵ And, accordingly, the application of them ceases, whenever such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one particular object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take, there being, in such a case, no general charitable intention.⁶ So, if a fund should be given in trust, to apply the income to printing and promoting the doctrines of the supremacy of the Pope in ecclesiastical affairs in England, the trust would be held void on grounds of public policy; and the property would go to the personal representatives of the party creating the trust; and it would not be liable to be applied

held the residuary bequest to charitable purposes void for uncertainty, and because the testator expressed not a present, but a future intention to devise this property. Lord Eldon, however, upon an appeal, reversed the decree, and established the bequest as a good charitable bequest, and directed it to be carried into effect accordingly. *Attorney-General v. The Drapers' Company*, 2 Beavan, R. 508; *Attorney-General v. The Coopers' Company*, 3 Beavan, R. 29; *Ante*, § 1167, 1170.

¹ *Ibid.*

² *Loscomb v. Wintringham*, 7 Eng. Law & Eq. R. 164.

³ *Attorney-General v. Earl of Winchelsea*, 3 Bro. Ch. R. 373, 379; *Attorney-General v. Hurst*, 2 Cox, R. 364; *Attorney-General v. Wilson*, 3 Mylne & Keen, 362, 372; *Attorney-General v. The Drapers' Company*, 2 Beavan, R. 508; *Attorney-General v. The Coopers' Company*, 3 Beavan, R. 29; *Ante*, § 1167, 1178

⁴ [**Attorney-General v. Trinity College, Cambridge*, 24 Beavan, 383.]

⁵ *Mills v. Farmer*, 1 Meriv. R. 65, 79, 81, 94, 95, 99; *Legge v. Asgill*, 1 Turn & Russ. 265, note.

⁶ *Attorney-General v. Hurst*, 2 Cox, R. 354, 365; *Corbyn v. French*, 4 Ves. 419, 433; *De Garcin v. Lawson*, 4 Ves. 433, note; *Jeremy on Eq. Jurisd.* B. 1, ch. 6, § 2, p. 243 to 245.

to other charitable purposes by the crown, because it was not intended to be a general trust for charity.¹ Even in the case of gifts or bequests to superstitious uses, which (as we have seen) are not held to be void, but the funds are applied in chancery to other lawful objects of charity,² the professed ground of the doctrine is, (though certainly it is a most extraordinary sort of interpretation of intention,) that the party has indicated a general purpose to devote the property to charity; and, therefore, although his specified object cannot be accomplished, yet his general intention of charity is supposed to be effectuated by applying the funds to other charitable objects.³ How courts of equity could arrive at any such conclusion, it is not easy to perceive, unless, indeed, where the nature of the gift necessarily led to the conclusion, that the object specified was a favorite, though not an exclusive, object of the donor. To such cases, it has, in modern times, been practically and justly limited.⁴

¹ *De Themmines v. De Bonneval*, 5 Russ. R. 288. [In England, a bequest for the assistance of a "Unitarian Congregation" has been held to be valid, and the trust directed to be carried into execution. *Shrewsbury v. Hornby*, 5 Hare, R. 406. See also *Miller v. Gable*, 2 Denio, R. (N. Y.) 492; *Scott v. Curle*, 9 B. Monroe, 17, a bequest to the "regular Baptist order."] [* But a bequest of pure personalty, to be applied in purchasing and procuring the discharge of persons, who, at the time of the testator's decease, or within five years, should be committed to prison for non-payment of fines, fees, or expenses, under the game-laws, was held void, as being against public policy. *Thrupp v. Collett*, 5 Jur. N. S. 111.]

² *Ante*, § 1168.

³ *Ibid.*; *Moggridge v. Thackwell*, 7 Ves. 69 to 83; *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522; *Mills v. Farmer*, 1 Meriv. R. 99 to 101; *Omma-ney v. Butcher*, 1 Turn. & Russ. R. 260, 270. In *De Themmines v. De Bonneval* (5 Russ. R. 297), the Master of the Rolls said: "The policy of the law will not permit the execution of a superstitious use. But the court avails itself of the general intention to give the property to charity, although the particular charity chosen by the founder be superstitious; and it effectuates the general intention by devoting the fund to some other charitable purpose." How can the court presume an intention of the testator to give to charity generally, when he has expressed himself only as to a particular object, that is, as to a superstitious use?

⁴ This practical application of the doctrine was strongly illustrated in a recent case where a testator gave the residue of his estate to trustees, positively forbidding them to diminish the capital by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than in the will directed, namely, one half, yearly, and every year forever, under the redemption of British slaves in Turkey and Barbary; one fourth part, yearly, and every year forever, unto charity schools in the city and suburbs of London, &c., and not giv-

§ 1183. Hence it has become a general principle in the law of charities, that, if the charity be of a general, indefinite, and mere ing to any one above £20 a year; and the other fourth to other specified uses. The question was, What was to become of the income of the moiety for the redemption of the British slaves in Turkey and Barbary, there being, from the altered circumstances of the countries, no objects of this bounty. The Master of the Rolls said, on that occasion, that the jurisdiction of courts of equity, with respect to charitable bequests, is derived from their authority to carry into execution the trusts of any will or other instrument; and the court is to proceed according to the intention expressed in the will or testament; that the court, in the present case, had no authority to apply the moiety to any other use, as it would not be executing the expressed intention of the testator; and that it could be applied to some other use by a new scheme under the sanction of the legislature. Upon appeal, Lord Chancellor Brougham reversed the decree, and held that the court might apply it to a new scheme *cy pres*. Upon this occasion he said: "When a testator gives one charitable fund to three several classes of objects, unless he excludes, by some express provisions, the application of one portion to the purpose to which the others are destined, it is clear that the court may thus execute his intention, in the event of an impossibility of applying that portion to its original destination. The character of charity is impressed on the whole fund. There is good sense in presuming that, had the testator known that one object was to fail, he would have given its appropriated fund to the increase of the funds destined to other objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of *cy pres*, &c. I should have been disposed to favor the relators' argument on which the decree must rest, had the will been, that one half should be employed in redeeming captives, and in no other way whatever; or that the two fourths should be employed in other charities, and no more than these two fourths in those or any such charities. But that is far from being the case. The testator says: 'The capital shall not be diminished by giving away any part thereof; and the interest shall not be applied to any other use or uses than those hereinafter mentioned.' The object of this general prohibition plainly is, to secure the whole fund, principal and interest, to charitable uses; to forbid any alienation of the capital, and any diversion of the income to any other purposes than those which he specifies. The expression 'use or uses,' even literally taken, lets in all the charities specified, provided the fund be given among them, and not otherwise applied. Undoubtedly the funds must be applied in the proportions specified, one half to one, and one fourth to each of the two other objects; and it would be a breach of trust to give part of the moiety to either of the two other purposes, so long as there remained captives to redeem. But then it would be just as much a breach of trust without the prohibitory clause as with it, &c. So in the case of a charity, where I bequeath £100 to one object, and £50 each to two other objects of bounty, my trustees violate their duty if they give less than £100 to the one, and more than £50 to each of the other two; and that whether I use words of exclusion, such as 'no otherwise,' 'no other charities,' &c., or omit to use them. But when the one object fails, the doctrine of *cy pres* becomes applicable, although it has no place in legacies to individuals; and the intention to which the court is to approx-

private nature, or not within the scope of the statute of Elizabeth, it will be treated as utterly void, and the property will go to the next of kin. For, in such a case, as the trust is not ascertained, it must either go as an absolute gift to the individual selected to distribute it, or that individual must be a trustee for the next of kin.¹ If the testator means to create a trust, and the trust is not effectually created, or fails, the next of kin must take.² On the other hand, if the party selected to make the distribution is to take it, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion of the party to apply the fund or not. The latter position is repugnant to the very purpose of the bequest; and, therefore, the interpretation is, that it is the case of a frustrated and void trust.³

§ 1184. It has been made a question, whether a court of equity, sitting in one jurisdiction, can execute any charitable bequests for foreign objects in another jurisdiction. The established doctrine seems to be in favor of executing such bequests.⁴ Of course, this

imate will be gathered from the other gifts, and from the gift itself. Should words be used which positively exclude such an approximation, as, for instance, if there be an express direction that each of the charities named shall have so much, and neither more nor less, and one shall not be extended in case the objects of another fail,—then, clearly, the doctrine can have no place. But that is because the will of the testator has expressly said so; and by acting against his clear intent, the court would not be executing *cy pres* (as near as possible), but departing as far as possible from that intent. This cannot be said of the general words used here, which are abundantly satisfied, if no part of the capital is given away at all; and no part of the interest to any other than the specified purposes. Nor is the will at all violated by applying the undisposed and undisposable surplus of one branch to increase the objects of the other branches of the same charity.” *Attorney-General v. Ironmongers’ Company*, 2 Mylne & Keen, 576, 580, 586 to 589. See also *Hayter v. Trego*, 4 Russ. 113.

¹ *Ante*, § 979 *a*, 979 *b*, 1156, 1157; *Post*, § 1197 *a*; *Trustees of Baptist Association v. Hart’s Ex’rs*, 4 Wheat. R. 1, 33, 39, 43 to 45; *Stubbs v. Sargon*, 2 Keen, R. 255; *Ommaney v. Butcher*, 1 Turn. & Russ. 260, 270, 271; *Fowler v. Garlike*, 1 Russ. & Mylne, 232.

² *Ibid.*

³ *Ommaney v. Butcher*, 1 Turn. & Russ. 260, 270; *Attorney-General v. Pearson*, 7 Sim. R. 290; *Stubbs v. Sargon*, 3 Mylne & Craig, 507; *Ante*, § 979 *b*, 1068.

⁴ *Attorney-General v. City of London*, 3 Bro. Ch. R. 171; S. C. 1 Ves. Jr. 243; *Attorney-General v. Lepine*, 2 Swanst. R. 181; S. C. 19 Ves. 309; *Oliphant v. Hendrie*, 1 Bro. Ch. R. 571, and Mr. Belt’s note (1); *Society for Propagating the Gospel v. Attorney-General*, 3 Russ. R. 142. In the case of Mr. Boyle’s Will, the bequest was not limited in terms to foreign countries or objects, but it was applied to a foreign object under a decree of the Court of Chancery; and when

must be understood as subject to the implied exception, that the objects of the charities are not against the public policy or laws of the state where they are sought to be enforced, or put into execution; for no state is under any obligation to give effect to any acts of parties which contravene its own policy or laws. Upon this ground, where a bequest was given by the will of a testator in England, in trust for certain nunneries in foreign countries, it was held void, and the Court of Chancery refused to enforce it.¹ Upon the same ground, a pecuniary legacy, given for such purposes as the superior of a foreign convent, or her successor, shall judge most expedient, was held void.² But where a testator bequeathed the remainder of his property to the government of Bengal, to be

that object failed, a new scheme was directed. *Attorney-General v. City of London*, 3 Bro. Ch. Cas. 171; S. C. 1 Ves. Jr. 243. There are several other cases in which charities for foreign objects have been carried into effect. In the *Provost, &c., of Edinburgh v. Aubery*, Ambl. R. 236, there was a devise of £3,500, South Sea Annuities, to the plaintiffs, to be applied to the maintenance of poor laborers, residing in Edinburgh and the towns adjacent. Lord Hardwicke said he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland; and therefore he directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. So in *Oliphant v. Hendrie*, where A., by will, gave £300 to a religious society in Scotland, to be laid out in the purchase of hereditible securities in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest. 1 Bro. Ch. Cas. 571. In *Campbell v. Radnor*, the court held a bequest of £7,000, to be laid out in the purchase of lands in Ireland, and the rents and profits to be distributed among poor people in Ireland, &c., to be valid in law. 1 Bro. Ch. Cas. 171. So a legacy towards establishing a bishop in America was supported, although no bishop was then established. *Attorney-General v. Bishop of Chester*, 1 Bro. Ch. Cas. 444. In the late case of *Curtis v. Hutton*, a bequest of personal estate for the maintenance of a charity (a college) in Scotland, was established. 14 Ves. 537. And in another still more recent case, a bequest in trust to the magistrates of Inverness in Scotland, to apply the interest and income for the education of certain boys, was enforced as a charity. *Mackintosh v. Townsend*, 16 Ves. 330. See also *Trustees of Baptist Association v. Smith*, 3 Peters, R. App. 500 to 503. Nor is the uniformity of the cases broken in upon by the doctrine in *De Garcin v. Lawson*, 4 Ves. Jr. 433, note. There, the bequests were to Roman Catholic clergymen, or for Roman Catholic establishments, and were considered as void and illegal, being equally against the policy and the enactments of the British legislation. See also 3 Peters, R. 500 to 503.

¹ *De Garcin v. Lawson*, 4 Ves. 433, note.

² *Smart v. Prujean*, 6 Ves. 567; *De Themmines v. De Bonneval*, 5 Russ. R. 292, 297.

applied to charitable, beneficial, and public works at and in the city of Decca in Bengal, it was held to be a valid charity.¹

§ 1185. But every bequest, which, if it were to be executed in England, would be void under its mortmain laws, is not, as a matter of course, held to be void solely on that account when it is to be executed in a foreign country. There must be some other ingredient, making it reprehensible in point of public policy generally, or bringing it within the reach of the mortmain acts. Thus, for example, money bequeathed by a will to be laid out in lands abroad (as in Scotland), may be a valid bequest, and executed by an English court of equity, when money to be laid out in lands in England would be held a void bequest, as contrary to the mortmain acts of England.²

§ 1186. Where money is bequeathed to charitable purposes abroad, which are to be executed by persons within the same territorial jurisdiction where the court of equity sits, the latter will secure the fund, and cause the charity to be administered under its own direction. But, where the charity is to be established abroad, and is to be executed by persons there, the court not having any jurisdiction to administer, it will simply order the money to be paid over to the proper persons in the foreign country, who are selected by the testator as the instruments of his benevolence; and will leave it to the foreign local tribunals to see to its due administration.³

§ 1187. It is clear, upon principle, that the Court of Chancery, merely in virtue of its general jurisdiction over trusts, independently of the special jurisdiction conferred by the statute of 43d Elizabeth, ch. 4, must, in many cases, have a right to enforce the due performance of charitable bequests; for the jurisdiction of courts of equity, with respect to charitable bequests, is derived from their general authority to carry into execution the trusts of a will or other instrument, according to the intention expressed in that will or instrument.⁴ We shall presently see that this is

¹ *Mitford v. Raynolds*, 1 Phillips, Ch. R. 185.

² *Oliphant v. Hendrie*, 1 Bro. Ch. R. 571, and Mr. Belt's note; *Mackintosh v. Townsend*, 16 Ves. 330; 2 Madd. Ch. Pr. 50; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1 § 1, note (b).

³ *The Provost of Edinburgh v. Aubery*, Ambler, R. 336; *Attorney-General v. Lepine*, 2 Swanst. R. 181; S. C. 19 Ves. 309; *Emery v. Hill*, 1 Russ. R. 112; *Minet v. Vulliamy*, 1 Russ. R. 113, note.

⁴ *Attorney-General v. Ironmongers' Company*, 2 Mylne & Keen, 581; *Post*, § 1191.

strictly true in all cases where the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees who are specially appointed for the purpose.¹ But there are many cases in which the jurisdiction exercised over charities in England can scarcely be said to belong to the Court of Chancery, as a court of equity; and where it is to be treated as a personal delegation of authority to the Chancellor, or as an act of the crown, through the instrumentality of that dignitary.²

§ 1188. The jurisdiction exercised by the Chancellor, under the statute of 43d Elizabeth, ch. 4, over charitable uses, is held to be personal in him, and not exercised in virtue of his ordinary or extraordinary jurisdiction in chancery; and in this respect it resembles the jurisdiction exercised by him in cases of idiots and lunatics, which is exercised purely as the personal delegate of the crown.³ Where a commission has issued under that statute, any person, excepting to the decree of the commissioners, is treated as a plaintiff in an original cause in chancery, and the respondents as defendants; and in the examination of witnesses in the cause, thus brought by way of appeal before the Chancellor, neither side is bound by what appeared before the commissioners; but they may set forth new matter, if they think proper. If it were not considered on such an appeal, as an original cause, the court could know nothing of the merits; for the evidence before a jury, or before the commissioners under the commission, is not taken in writing, but is *vivâ voce*; and therefore it could not be known to the appellate court.⁴

§ 1189. But, as the Court of Chancery may also proceed in many, although not in all, cases of charities by original bill, as well as by commission under the statute of Elizabeth, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general has been mixed with the jurisdiction given to the Chancellor by the statute.⁵ So that it is not always easy to ascertain in what cases he acts as a judge, administering the common duties of a court

¹ *Post*, § 1191.

² *Post*, § 1188, 1190.

³ 3 Bl. Comm. 427, 428.

⁴ *Corporation of Burford v. Lenthall*, 2 Atk. 552; 3 Black Comm. 427; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, and note (a).

⁵ *Ibid.*; 3 Black. Comm. 427; *Anon.* 1 Ch. Cas. 267; *West v. Knight*, 1 Ch. Cas. 134.

of equity, and in what cases he acts as a mere delegate of the crown, administering its peculiar duties and prerogatives. And again, there is a distinction between cases of charity, where the Chancellor is to act in the Court of Chancery, and cases where the charity is to be administered by the king, by his sign-manual. But in practice the cases have often been confounded from similar causes.¹

§ 1190. The general doctrine in England is, that the king, as *parens patriæ*, has a right to guard and enforce all charities of a public nature, by virtue of his general superintending power over the public interests, where no other person is intrusted with that right.² Wherever, therefore, money is given to charity generally, and indefinitely, without any trustees pointed out, who are to administer it, there does not seem to be any difficulty in considering it as a personal trust, devolved upon the king, as a constitutional trustee, to be administered by him, through the only proper functionary known to that government, namely, the Lord Chancellor, who is emphatically, for all public purposes of this sort, styled the keeper of his conscience.³ In such a case, it is not, ordinarily, very important whether the Chancellor acts as the special delegate of the crown, or the king acts under the sign-manual, through his Chancellor guiding his discretion. In practice, however, it has been found very difficult to distinguish in what cases the one or the other course, ought, upon the strict principles of prerogative, to be adopted. For, where money has been given to trustees for

¹ *Moggridge v. Thackwell*, 7 Ves. 83 to 86.

² 3 Black. Comm. 427; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (a); *Attorney-General v. Middleton*, 2 Ves. 327; *Moggridge v. Thackwell*, 7 Ves. 35, 83; *Cary v. Bertie*, 2 Vern. 233, 342; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 119.

³ *Ibid.*; *Cooper*, Eq. Pl. Introd. xxvii.; *Cary v. Bertie*, 2 Vern. 333, 342; *Mitf. Eq. Pl. by Jeremy*, 739, 101, note (g); *Bailiffs of Burford v. Lenthall*, 2 Atk. 551. In all these cases, the mode in which the establishment and administration of the charity is usually accomplished, is upon an information filed by the Attorney-General, *ex officio*, at the relation of some informant, upon which the Lord Chancellor acts generally in the same manner and by the same proceedings, as he would upon a bill in chancery. The whole matter of charities has been regulated by recent statutes (52 Geo. 3, ch. 101; 59 Geo. 3, ch. 91), so that proceedings may now, in many cases, be had to establish and execute them in a more brief and summary manner than formerly. See 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (a); 3 Bl. Comm. 427; *Reeve v. Attorney-General*, 3 Hare, R. 197, 199.

charity generally, without any objects selected, the charity has sometimes been administered by the king, under his sign-manual, and sometimes by the Court of Chancery. Lord Eldon, after a full review of all the cases, came to the conclusion (which is now the settled rule) that, where there is a general indefinite purpose of charity, not fixing itself upon any particular object, the disposition and administration of it are in the king by his sign-manual.¹ But, where the gift is to trustees, with general objects, or with some particular objects pointed out, there the Court of Chancery will take upon itself the administration of the charity, and execute it under a scheme to be reported by a master.²

¹ In cases of superstitious uses, the charity has been held to be subject to the administration of the crown, under the sign-manual, as an indefinite purpose of charity. See *Mills v. Farmer*, 1 Meriv. R. 100, 101; *De Themmines v. De Bonneval*, 5 Russ. R. 292, 293; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 3, note (i); *Attorney-General v. Herrick*, Ambler, R. 712; *Da Costa v. De Pas*, Ambler, R. 228; S. C. 2 Swanst. R. 489, note; 2 Roper on Legacies, by White, ch. 19, § 2, p. 111 to 117.

² *Moggridge v. Thackwell*, 7 Ves. 36, 75, 85, 86; *Attorney-General v. Matthews*, 2 Lev. 167; *Attorney-General v. Herrick*, Ambler, R. 712; *Da Costa v. De Pas*, Ambler, R. 228, and Mr. Blunt's note; S. C. 2 Swanst. 489, note; *Mills v. Farmer*, 1 Meriv. R. 55; *Attorney-General v. Wansay*, 15 Ves. 231; *Ommamney v. Butcher*, 1 Turn. & Russ. R. 260, 270; *Paice v. Archbishop of Canterbury*, 14 Ves. 372; *Waldo v. Caley*, 16 Ves. 206; *Attorney-General v. Price*, 17 Ves. 371; 3 Peters, R. 498 to 500; 2 Roper on Legacies, by White, ch. 19, § 5, p. 164 to 215; *Reeve v. Attorney-General*, 3 Hare, R. 191, 197. The following statement of the practice of the Court of Chancery, in regard to charities, taken from Mr. Fonblanque on Equity (Vol. 2, B. 2, Pt. 2, ch. 1, § 3, note i), may not be unacceptable, as a further illustration of the mode of effectuating the objects. "With respect to gifts to charitable uses, where no specific description of objects is pointed out, the Court of Chancery will, in respect to the general charitable purpose appearing, direct the mode of giving it effect. *Attorney-General v. Herrick*, Ambler, R. 712; *Attorney-General v. The Painters' Company*, 2 Cox, R. 56. And this is agreeable to the rule of the civil law, which is so peculiarly favorable to charities, that legacies to pious or public uses shall not fail from the want of certainty as to the particular object intended. See 2 Domat, Civ. Law, 161, 162. If not only the general purpose appear, but also a particular description of persons or objects be referred to, though as between such persons or objects the party has made no selection; yet the court will confine its discretion in supplying such omissions within the limits of such general description. *White v. White*, 1 Bro. Ch. R. 12; *Moggridge v. Thackwell*, 3 Bro. Ch. R. 517; *Attorney-General v. Clarke*, Ambler, R. 422; *Waller v. Childs*, Ambler, R. 524; *Attorney-General v. Wansay*, 15 Ves. 231. If the object of the gift be certain, but not at present in existence, yet if its existence may be expected hereafter, the court will neither consider the gift lapsed, nor apply it to a different use. *Aylet v. Dodd*, 2 Atk. 238; *Attor-*

§ 1191. But where a charity is definite in its objects, and lawful in its creation, and it is to be executed and regulated by trustees, whether they are private individuals or a corporation; there, the administration properly belongs to such trustees; and the king, as *parens patriæ*, has no general authority to regulate or control the administration of the funds. In all such cases, however, if there be any abuse or misuse of the funds by the trustees, the Court of Chancery will interpose, at the instance of the attorney-general, or the parties in interest, to correct such abuse or misuse of the funds. But, in such cases, the interposition of the court is properly referable to its general jurisdiction, as a court of equity, to prevent abuse of a trust, and not to any original right to direct the management of a charity, or the conduct of the trustees.¹ Indeed, if the trustees of the charity should grossly abuse their trust, a court of equity may go the length of taking it away from them, and commit the administration of the charity to other hands.² But this is no more than the court will do, in proper cases, for any gross abuse of other trusts.

§ 1191 *a*. Some doctrines on the subject of what constitutes such an abuse or misuse of charitable trusts, and especially of trusts of a religious nature, by trustees, have been recently promulgated, which are of such deep interest, and general application, that they seem to require a brief notice in this place. Thus, where a meeting-house was founded by certain Protestant Dissenters, and the property vested in trustees, upon the trust to be used "for the

ney-General *v. Lady Downing*, Ambl. 571; *Attorney-General v. Oglander*, 3 Bro. Ch. Rep. 166. But if the charity or object of the gift be precisely pointed out, and fail, it seems then, in general, that it shall not be applied to another. *Attorney-General v. Bishop of Oxford*, 1 Bro. Ch. R. 379; *Attorney-General v. Goulding*, 2 Bro. Ch. R. 429. But see also *Attorney-General v. City of London*, 3 Bro. Ch. R. 171; 1 Ves. Jr. 243; *Shanley v. Baker*, 4 Ves. 732."

¹ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (a); *Id.* § 3, note (i); *Attorney-General v. Middleton*, 2 Ves. 328; *Cook v. Duckenfield*, 2 Atk. 567, 569; *Attorney-General v. Foundling Hospital*, 4 Bro. Ch. R. 165; S. C. 2 Ves. Jr. 42; *Philadelphia Baptist Association v. Smith*, 4 Wheat. 1; S. C. 3 Peters, R. App. 498 to 500; [* *Attorney-General v. Boucherett*, 25 Beavan, 116.]

² *Attorney-General v. Mayor of Coventry*, 7 Bro. Parl. Cas. 236; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, 499; *Attorney-General v. Utica Insurance Company*, 2 Johns. Ch. R. 389; *Bridgman on Duke on Char. Uses*, 574, &c.; *In re Chertsey Market*, 6 Price, R. 261. Under what circumstances a court of equity will sanction the alienation of charitable property, see *Attorney-General v. South Sea Company*, 4 Beavan, R. 453

worship and service of God"; it has been held that no doctrines ought to be allowed to be taught in it which were opposed to the opinions of the founders, although those opinions were not expressed in the trust-deed, and no particular doctrines were there required to be taught; and that it would be a breach of trust in the trustees to allow any other doctrines than those of the founders, to be so taught. So that, if the founders were Trinitarians, no Unitarian doctrine should be allowed to be taught there; and, *è converso*, if the founders were Unitarian, the doctrines of Trinitarians should not there be taught. The effect of this doctrine is, to expound the language of the instrument, not upon its own terms, but to incorporate into them the presumed parol intentions of the parties not expressed in the instrument. It hence assumes, as a necessary result, that the founders never could intend that any other religious doctrines than what they themselves then professed should be taught therein throughout all future times.¹

¹ Attorney-General v. Pearson, 3 Meriv. 353; 7 Sim. R. 290; Drummond v. Attorney-General, 2 Eng. Law & Eq. R. 15, an important case in the House of Lords. See, also, Glasgow College v. The Attorney-General, 1 House of Lords Cases, 800; Attorney-General v. Wilson, 16 Simons, 210; Attorney-General v. Gardner, 2 De Gex & Smale, 102; Attorney-General v. Munroe, 2 De Gex & Smale, 122; Attorney-General v. Murdoch, 7 Hare, 445; Attorney-General v. Hutton, 7 Irish Eq. R. 612; 1 Drury, 480; Attorney-General v. Shore, 7 Sim. R. 309, note; 11 Sim. R. 592; 16 Id. 210. In this latter case, commonly known as the case of Lady Hewley's charity, Lord Lyndhurst, in giving judgment, stated the general ground of the doctrine in these words: "In every case of charity, whether the object of the charity be directed to religious purposes or to purposes purely civil, it is the duty of the court to give effect to the intent of the founder, provided this can be done without infringing any known rule of law. It is a principle that is uniformly acted upon in courts of equity. If, as they have stated, the terms of the deed of foundation be clear and precise in the language, and clear and precise in the application, the course of the court is free from difficulty. If, on the other hand, the terms which are made use of are obscure, doubtful, or equivocal, either in themselves or in the application of them, it then becomes the duty of the court to ascertain by evidence, as well as it is able, what was the intent of the founder of the charity, in what sense the particular expressions were used. It is a question of evidence, and that evidence will vary with the circumstances of each particular case. It is a question of fact, to be determined; and the moment the fact is known and ascertained, then the application of the principles is clear and easy. It can scarcely be necessary to cite authorities in support of these principles. They are founded in common sense and common justice; but if it were necessary to refer to any authority, I might refer to the case which has been already mentioned, the case of the Attorney-General v. Pearson, and to another case which was cited at the bar, the case in the House of Lords. Through-

§ 1192. It seems, that, with a view to encourage the discovery of charitable donations, given for indefinite purposes, it is the practice for the crown to reward the persons who make the communication if they can bring themselves within the scope of the charity, by giving them a part of the fund ; and the like practice, whether well or ill founded, takes place, also, in relation to escheats.¹

§ 1192 *a*. It seems, that the statute of limitations, and the bar from lapse of time, will not be allowed to prevail in cases of charitable trusts, in the same manner as it would in cases of mere private trusts. Thus, in the case of a charitable trust, where a corporation had purchased with notice of the trust, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts.²

§ 1193. These are the principal doctrines and decisions, under the statute of Elizabeth, respecting charitable uses, which it seems most important to bring in review before the learned reader. It

out those judgments, the principles, which have been stated, were acknowledged and acted upon by a noble and learned judge, of more experience in courts of equity, and more experience in questions of this nature, than any other living person. I look upon it, then, that these principles are clear and established ; that they admit of no doubt whatever." The case was finally carried to the House of Lords, where the decree of the court below was affirmed, but upon grounds somewhat different from, and more qualified than, those which governed in that court. Upon that occasion, the judges of the courts of law were called upon to express their opinions ; and not agreeing in their views, they delivered their opinions *seriatim*, all being in favor of the affirmance of the decree, except Mr. Justice Maule. The opinions are full of learning and instruction upon that most difficult question, how far parol evidence is admissible, of the opinions of the donor, to explain and modify the sense of the language used by him. The report in the House of Lords will be found in 9 Clark & Finnel. 355. See, also, 1 Greenl. on Ev. § 295, note 1, 2d edit. It is not my design to enter into any comments upon the doctrine stated in the text. That the judgments are free from difficulty, and that they stand upon as unquestionable principles, as the learned judges suppose, in their reasoning, may admit of serious doubt and discussion. No such doctrine has as yet ever been promulgated in America ; and, from the peculiar circumstances of the country and the diversity of religious opinions, it is improbable that it ever will be. But see *Ante*, § 1182, note ; *Miller v. Gable*, 2 Denio, R. (N. Y.) 492. [The English rule was fully approved and adopted in the late case of *Inh. of Princeton v. Adams*, 10 Cush. R. 132 ; *Kniskern v. Lutheran Church*, 1 Sandf. Ch. R. 439.]

¹ Per Lord Eldon, in *Moggridge v. Thackwell*, 7 Ves. 36, 71.

² *Attorney-General v. Christ's Hospital*, 3 Mylne & Keen, 344.

may not be useless to add, that the statute of mortmain and charities of the 9th of Geo. II. ch. 36, has very materially narrowed the extent and operation of the statute of Elizabeth; and has formed a permanent barrier against what the statute declares to be a "public mischief," which "had of late greatly increased, by many large and improvident alienations or dispositions, made by languishing and dying persons, or others, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs."

§ 1194. This statute of 9th George II. ch. 36, was never extended to, or adopted by, the American Colonies generally.¹ But certain of the provisions of it, and of the older statutes of mortmain,² have been adopted by some of the States of the Union.³ And it deserves the consideration of every wise and enlightened American legislator, whether provisions similar to those of this celebrated statute are not proper to be enacted in this country, with a view to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check an unfortunate propensity, (which is sometimes found to exist under a bigoted fanaticism,) the desire to acquire fame, as a religious devotee and benefactor, at the expense of all the natural claims of blood and parental duty.

[* § 1194 a. A case of some importance as affecting charitable trusts was recently decided by the Supreme Judicial Court of Massachusetts.⁴ The income of the fund when first devoted to charity was of moderate amount, but by advance in the value of property had now become very considerable. The great question in the case was in regard to the disposition of the increased income. The court held, that where the testator devised an estate to the rector and wardens of a church, in trust, out of the rents and profits, to pay a certain sum annually to the church for its own use, and certain other sums annually for certain public charities, and made no specific disposition of any surplus which may exist or arise; yet if it does not appear that such surplus is unexpected

¹ Attorney-General v. Stewart, 2 Meriv. R. 143.

² The 7th of Edw. I. stat. 2, De Religiosis; the 13th of Edw. I. ch. 32; the 15th of Richard II. ch. 5; and the 23d of Hen. VIII. ch. 10.

³ Binney, R. App. 626; Laws of New York, sess. 36, ch. 60, § 4; Jackson v. Hammond, 2 Cain. Cas. in Err. 337.

⁴ [* Attorney-General v. Trinity Church, 9 Allen, 422; *Ante*, § 1178.

by him, and he in various parts of the will indicates that he intends the devise for the benefit of the church, and it subsequently proves that there is a large surplus, the church is entitled to hold it for its own use.

§ 1194 *b*. In a recent case¹ before the Court of Chancery Appeal, it was decided, that, both upon principle and authority, a scheme settled by the court for the administration of a charity will be remodelled, if lapse of time and change of circumstances require that alterations should be made in it. And even where, from change of circumstances, a scheme settled by the court proves defective, the court will declare a new scheme, remedying such defects; but will remodel such a scheme with more hesitation and greater circumspection than if the court had not already passed upon the subject.

§ 1194 *c*. The question of charitable trusts is extensively discussed by Mr. Justice Wayne, in the case of *Perin v. Carey*.² It is here held that a municipal corporation may act as the trustee, and that the indefinite nature of the primary objects of the trust, or the fact that they are of the descendants of the donor, or of others named by him, will form no impediment to its being carried into effect as a public charity.

§ 1194 *d*. A question arose in New Jersey, how far a conveyance of land in fee to a religious corporation, with limitation upon the use, as that it should be used for a Lutheran Church forever, and that the grantee should not alienate or incumber the estate for any purpose, would render a mortgage created by the grantee inoperative. It was held that, if such conveyance were a gift to the corporation, the mortgage would be wholly inoperative; but the land being purchased by the mortgagors for full consideration paid by them, it was not in their power in this mode to place their property beyond their own control or that of their creditors.³

¹ *Attorney-General v. Corporation of St. John's Hospital*, 12 Jur. N. S. 127.

² 24 How. U. S. 465.

³ *Magie v. The Dutch Church*, 2 Beasley, 77.]

CHAPTER XXXIII.

IMPLIED TRUSTS.

[* § 1195. Implied trusts are those resulting from implications of fact, or of law.

§ 1196. Trusts from delivery of money, or other property, revocable.

§ 1196 a. Trusts resulting from property coming to one's hands for a purpose which fails, or is illegal, or is fully accomplished.

§ 1196 b. Trustee, after trusts terminated, sometimes holds, beneficially, in default of heirs.

§ 1197. Conveyance without consideration raises resulting trust.

§ 1198. This in analogy to the rules of the common law.

§ 1199. Residue undisposed of forms a resulting trust.

§ 1199, note l, 1202. Resulting trusts may be rebutted by parol.

§ 1200. Where trusts fail, resulting trust arises for grantor, or his heirs.

§ 1201. Trust results in favor of party paying purchase-money.

§ 1201 a. Rule does not apply to agent, who pays his own money, although directed to buy for his principal.

§ 1201 b. No trust results in favor of alien.

§ 1203. Deed to son rebuts resulting trust, in favor of father.

§ 1204. So also of securities, taken to wife, or children.

§ 1205. So, too, of conveyances to child unprovided for.

§ 1206. Slight circumstances defeat the survivorship in joint tenancy.

§ 1207. No survivorship in commercial purchases.

§ 1207 a. Partner not obliged to exercise office, for benefit of his partner, after dissolution.

§ 1208. Executor entitled to personalty undisposed of.

§ 1209. But in equity is liable for debt due estate.

§ 1210. Land purchased with trust-funds affected with trust.

§ 1211. Trustee's acts enure for benefit of *cestui que trust*.

§ 1211 a. The same rule applies to all fiduciary relations.

§ 1212. Equity treats property as real or personal, according to the intent of the persons interested.

§ 1213. So also in its descent or transmission.

§ 1213 a. Land charged with payment of debts, treated as personalty, to that extent.

§ 1214. Equity will not treat property as converted, unless there is a clear intention to that effect.

§ 1214 a. What shall be evidence of such intention.

§ 1215. Equitable liens such as are recognized in courts of equity.

§ 1216. Liens arise from express contract, or custom.

§ 1216 a. Courts of equity realize the lien earlier than courts of law.

§ 1216 b. Will enforce judgment liens on equitable freeholds.

§ 1216 c. Will accelerate the enforcement of specialty liens.

§ 1217. Will enforce liens not recognized at law.

§ 1218. Vendor's liens for purchase-money recognized.

§ 1219. The equity of it rests upon clear grounds.

§ 1220. Purchaser virtually consents to such lien.

§ 1221 - 1222. This lien derived from the civil law.

- § 1223. In what cases the lien is waived in the civil law.
- § 1224. It seems very uncertain when vendor's lien is gone
- § 1225. Acknowledgment of payment, in deed, no bar.
- § 1226. Taking security for money no waiver of lien.
- § 1227. Lien may be enforced by those holding under vendor.
- § 1228. Lien does not affect *bonâ fide* purchasers.
- § 1229. Creditor taking estate, as security.
- § 1230. Liens by deposit of title-deed, similar.
- § 1231. Special liens create by implication.
- § 1231 a. Covenant to secure money or land, creates no specific lien.
- § 1231 c. How far purchaser of equity bound to pay mortgage.
- § 1231 d. The essence of a mortgage is a security for debt.
- § 1232. Vendor's lien enforced upon unpaid purchase-money.
- § 1233. Third parties, to whom purchaser agrees to pay it, have no lien.
- § 1233 a. Solicitor has no lien beyond that of his client.
- § 1233 b. Portions of encumbered land first conveyed last charged.
- § 1234. Joint owners have an equitable lien for repairs.
- § 1235. Repairs on house or mill recoverable at common law, but not improvements.
- § 1236. Equity will often include improvements.
- § 1237. Equity requires payment for beneficial improvements.
- § 1238. Equity interferes, in such cases, on ground of implied fraud.
- § 1239. By the civil law all meliorations recoverable.
- § 1240. The civil law gave a lien in favor of artificers.
- § 1241. Such lien recognized here for repairs on foreign ships.
- § 1242. Part owners have no lien upon ship for outfit.
- § 1243. Partners have lien upon joint property.
- § 1244. How liens for payment of debts are enforced.
- § 1245. Distinction between devise, to pay debts, and subject, to payment of debts.
- § 1246. What constitutes a charge for payment of debts.
- § 1247. Exceptions stated.
- § 1247 a. Debts directed to be paid by executor a charge on property devised to him.
- § 1248. Charge on land not shifted, by covenant to pay it.
- § 1248 a. This rule extends to all encumbrances not created by the testator.
- § 1248 b. To shift the burden from the land, the testator must bind himself to creditor.
- § 1248 c. Direction to pay debts will not exonerate land, under English statute.
- § 1248 d. What expression of intention is sufficient.
- § 1248 e. The American rule corresponds with the English.
- § 1249. Covenant to settle annuity creates no lien upon lands generally.
- § 1250. Equity will enforce a claim against the party ultimately responsible.
- § 1251. Creditors may in equity recover of legatees.
- § 1252. Property of corporations held in trust for creditors.
- § 1252 a. Court of equity may compel restoration of money improperly applied by treasurer of corporation.
- § 1252 b. But cannot enforce the liabilities of foreign corporations against resident shareholders.
- § 1252 c. But this remedy is good as to domestic corporations.
- § 1253. Creditors of a partnership may pursue the joint property.
- § 1254. The extent of bankers' lien often difficult of determination.
- § 1255. Money received against good conscience regarded as a trust.
- § 1256. The imperfect remedy at law does not defeat that in equity.
- § 1257 - 1259. Equity will follow trust property wherever it can be identified, and was received with notice of the trust.

- § 1260. Equity will fix a trust upon land purchased with trust money.
- § 1261. All in fiduciary relation prohibited from profit arising out of trust.
- § 1261 *a*, 1261 *b*. Securities purchased with trust funds belong to *cestui que trust*.
- § 1261 *c*. How tortious trustee made responsible.
- § 1261 *e*. Assignees in bankruptcy liable to same extent as volunteers.
- § 1262. But he may repudiate them and pursue the funds, but cannot claim both.
- § 1263. So also in regard to other investments by trustees.
- § 1264. But *bonâ fide* sale defeats the trust, unless the trustee regains the property.
- § 1265. Party defrauding, trustee for party defrauded.
- § 1266. The responsibility of trustees, and remedies against them.
- § 1267. What amounts to breach of trust difficult to determine.
- § 1268–1268 *a*. Trustees bound to faithful and diligent administration.
- § 1169. Not responsible for losses caused by neglect of others.
- § 1269 *a*. The rule in regard to the investment of trust funds, in the English equity courts.
- § 1270. Unless he mix trust money with his own.
- § 1270 *a*. How far trust funds may be deposited in bank.
- § 1270 *b*. Same subject : Cannot depart from requirements of will.
- § 1271. Duty of trustees in making investments.
- § 1272. Courts of equity sometimes require strict care and diligence.
- § 1273. *Cestuis que trust* can only invest in such securities as the court approve.
- § 1273 *a*. Trustee who does not invest property bound to make good all deficiencies.
- § 1273 *b*. *Cestuis que trust* very poor, trust funds invested in bank stock.
- § 1273 *c*. Trustees cannot make *cestui que trust* party to partnership, &c.
- § 1273 *d*. Married woman, *cestui que trust*, has no power to advise investment.
- § 1273 *e*. Trustee can acquire no interest in trust fund. Statute of limitations.
- § 1273 *f*. Joint trustees, how far jointly responsible.
- § 1274. Trustee not allowed to invest or suffer trust funds to remain on personal security.
- § 1275. The duty of trustee and the mode of performing it.
- § 1275 *a*. Trustee in default may have benefit of what has gone for the performance of the trust.
- § 1276. Must follow special provisions of trust.
- § 1277, 1277 *a*. Trustee liable for interest earned, or which ought to have been.
- § 1277 *b*. How far one trustee can act for all.
- § 1277 *c*. Trustee cannot make any profit out of trust.
- § 1277 *d*. Responsibility of trustees as to life policy.
- § 1277 *e*. Trustees, acting on false evidence, responsible.
- § 1277 *f*. Responsibility of trustee by way of agency.
- § 1278. The object is to keep trustee active and fund safe.
- § 1279. Roman law pursued similar policy.
- § 1280. Joint trustee only liable for his own acts.
- § 1280 *a*. Joint executors often liable for the acts of each other.
- § 1281. The rule as to trustees more just than that as to executors.
- § 1282. Joint receipt of money by trustees.
- § 1283. Joint receipt *primâ facie* changes all.
- § 1283 *a*. One trustee factor for the whole.
- § 1284. Trustee who connives at the act of co-trustee, liable.
- § 1284 *a*. Redress against trustees lost by acquiescence.
- § 1284 *b*. Mode of inquiry in English courts.
- § 1284 *c*. Distinction between public and private trusts.
- § 1285, 1286. Debts from breach of trust treated as simple contract.

§ 1287. Will appoint new trustees if necessary.

§ 1288. Will remove trustees who cannot agree.

§ 1289. Will require proof of positive misconduct.

§ 1290. But reformation will not restore competency.

§ 1291. Equity will take cognizance of matters abroad.

§ 1292. Unless the remedy affects the realty.

§ 1293. So also in regard to mortgages and trusts.

§ 1294. Fraud in foreign judgments remediable in equity.

§ 1295 - 1300. The rule seems to extend to all personal duties, although the subject-matter be in a country strictly foreign.]

§ 1195. IMPLIED TRUSTS¹ may be divided into two general classes: first, those which stand upon the presumed intention of the parties; secondly, those which are independent of any such intention, and are forced upon the conscience of the party by operation of law; as for example, in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature. It has been said to be a general rule that the law never implies, and a court of equity never presumes, a trust, except in case of absolute necessity.² Perhaps this is stating the doctrine a little too strongly. The more correct exposition of the general rule would seem to be, that a trust is never presumed or implied, as intended by the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.

¹ Lord Nottingham's judgment, in *Cook v. Fountain*, 3 Swanst. R. 585, contains a classification of trusts, and of the general principles, which regulate implied trusts. "All trusts" (said he) "are either, first, express trusts, which are raised and created by act of the parties; or implied trusts, which are raised or created by act or construction of law. Again; express trusts are declared either by word or writing; and these declarations appear, either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the court, upon consideration of all circumstances, presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant. In the case in question, there is no pretence of any proof that there was a trust declared, either by word or in writing; so the trust, if there be any, must either be implied by the law, or presumed by the court. There is one good, general, and infallible rule, that goes to both these kinds of trust. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this: the law never implies, the court never presumes, a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so, at last, every case in court will become *casus pro amico*."

² *Cook v. Fountain*, 3 Swanst. R. 591, 592.

§ 1196. The most simple form, perhaps, in which an implied trust arising from the presumed intention of the parties, can be presented, is that of money, or other property, delivered by one person to another, to be by the latter paid or delivered over to and for the benefit of a third person. In such a case, (as we have seen,¹) the party so receiving the money, or other property, holds it upon a trust; a trust necessarily implied from the nature of the transaction, in favor of such beneficiary, although no express agreement has been entered into, to that effect.² But, even here, the trust is not, under all circumstances, absolute; for if the trust is purely voluntary, and without any consideration, and the beneficiary has not become a party to it by his express assent after notice of it, it is revocable; and if revoked, then the original trust is gone, and an implied trust results in favor of the party who originally created it.³

§ 1196 a. Another form in which a resulting trust may appear, is, where there are certain trusts created either by will or deed, which fail in whole or in part; or which are of such an indefinite nature that courts of equity will not carry them into effect; or which are illegal in their nature and character; or which are fully executed, and yet leave an unexhausted residuum. In all such cases, there will arise a resulting trust to the party creating the trust, or to his heirs and legal representatives, as the case may require.⁴

¹ *Ante*, § 1041; Com. Dig. *Chancery*, 4 W. 5.

² 4 Kent, Comm. Lect. 61, p. 307, 3d edit.; Com. Dig. *Chancery*, 4 W. 5.

³ *Ante*, § 972, 1036 b, 1041 to 1043; *Linton v. Hyde*, 2 Madd. R. 94; *Priddy v. Rose*, 3 Meriv. R. 102; *Dearle v. Hall*, 3 Russ. R. 1; *Loveridge v. Cooper*, 3 Russ. R. 30; *Page v. Broom*, 4 Russ. R. 6; *Walwyn v. Coutts*, 3 Meriv. R. 707; S. C. 3 Simons, R. 14; *Garrard v. Lord Lauderdale*, 3 Simons, R. 1; S. C. 2 Russ. & Mylne, 451; *Leman v. Whitely*, 4 Russ. R. 427.

⁴ *Stubbs v. Sargeon*, 2 Keen, R. 255; *Ommaney v. Butcher*, 1 Turn. & Russ. R. 260, 270; *Wool v. Cox*, 2 Mylne & Craig, 684; S. C. 1 Keen, 317; *Cook v. Hutchinson*, 1 Keen, 42, 50; *Ante*, § 979 a, 979 b, 1071, 1073, 1156, 1157, 1183. In *Cook v. Hutchinson*, 1 Keen, R. 42, 50, where a father made a deed to a son upon certain trusts for himself, his wife, and her children by him, after his decease, and no trust was declared of the surplus, it was held, that there was no resulting trust to the father; and that the son took the surplus. On this occasion, Lord Langdale said: "Upon this deed a question is made, whether there is or is not a resulting trust to the grantor as to the surplus, with respect to which there is no declaration of trust; and for the purpose of determining that question, it is necessary to look carefully to the language of the deed and to the circumstances

[* § 1196 *b*. But it was early held, in a case where the subject is very extensively discussed by eminent judges, Lord Mansfield dissenting from the decision,¹ that where the trusts had all failed, by the decease of the *cestuis que trust*, and the grantor was also deceased, without heirs, making a case for an escheat to the crown, or lord of the manor, if the legal title had remained in the grantor, a court of equity had no power to compel the trustee to convey the estate to the crown, in order to perfect the right of escheat. This virtually, or rather practically, (for the point was expressly left undecided,) established the right of the trustee to hold the land. In consequence, probably, of the great weight of Lord Mansfield's authority in the opposite direction, the question was regarded, by the profession in Westminster Hall, for a long time, as hanging *in*

of the particular case. In general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied, will result to the grantor; but that resulting trust may be rebutted even by parol evidence, and certainly cannot take effect, where a contrary intention, to be collected from the whole instrument, is indicated by the grantor. The distinctions applicable to cases of this kind are pointed out in the case of *King v. Denison*, by Lord Eldon, who adopts the principles laid down by Lord Hardwicke in *Hill v. The Bishop of London*. The conclusion to which Lord Hardwicke comes, is, that the question, whether there is or is not a resulting trust, must depend upon the intention of the grantor. 'No general rule,' he observes, 'is to be laid down, unless, where a real estate is devised to be sold for payments of debts, and no more is said; there it is clearly a resulting trust. But if any particular reason occurs why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the court to say, it shall not be a beneficial interest.' Let us consider what was the intention of the grantor of this deed. The father, being upwards of eighty years of age, executes a deed, which recites, that he was desirous of settling the property to which he was entitled, therein described, in such manner as to make a provision for himself during his life, and for his wife and children after his death, and for such other purposes as were thereafter expressed. This was the object he had in view; this was his intention as expressed in the instrument. He proceeds to make a release and assignment of the property comprised in the deed, to his son, 'upon the trusts thereafter declared concerning the same'; and, when he comes to declare those trusts, he does not exhaust the whole of the property. But I am of opinion that this is immaterial; for, after having carefully looked through the whole of this deed, I have come to the conclusion, considering the relation between the parties, and the object and purport of the instrument, that the father intended to part with all beneficial interest in the property, and that he meant his son to have the benefit of that part of the property of which the trusts are not expressly declared." See *Fowler v. Garlike*, 1 Russ. & Mylne, 232; *Post*, § 1200.

¹ [* *Burgess v. Wheate*, 1 William Black. 123; S. C. 1 Eden, Ch. R. 177.

dubio.^{*} But subsequent decisions,¹ by very eminent judges, made from time to time, more or less bearing upon the main question, have finally established the doctrine of the principal case. In a very late case,² the subject is again examined; and it is there held, that where a testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son, until he attained twenty-one, "and when and so soon" as he should attain twenty-one, the testatrix devised it to him in fee. But in case he should die before attaining twenty-one, to his children, if any, and if not, then to the defendants. The son did attain twenty-one and died without issue, in the lifetime of the testatrix. There being no heir, or next of kin of the testatrix, it was held that the trustee was entitled to hold the estate beneficially. The Master of the Rolls, Sir John Romilly, in giving judgment, said: "If the devise took effect at all, the trustee must take the legal estate. Having taken the legal estate, there are no trusts to perform, and he is therefore entitled to hold the property." "It is different from the case where the heir would have taken the legal estate, by reason of the estate of the trustees having determined with the determination of the trusts, in which case the right of the crown [to an escheat,] would have taken effect." In this case it was clear, that if the son had survived the testatrix, and died without heirs, after twenty-one, the right of escheat would have existed, as the legal estate would have been in the son, at his decease. And if an heir of the testatrix had survived her, the trustee would have held the estate, as a resulting trust, for the benefit of such heir. We see no reason why the same rules should not control estates in this country, on failure of heirs.]

§ 1197. Another common transaction, which gives rise to the presumption of an implied resulting use or trust is, where a conveyance is made of land or other property without any consideration, express or implied, or any distinct use or trust stated. In such a case, the intent is presumed to be, that it shall be held by

¹ *Fawcett v. Lowther*, 2 Vesey, 300; *Middleton v. Spicer*, 1 Br. C. C. 201; *Walker v. Denne*, 2 Vesey, Jr. 170; *Williams v. Lord Lonsdale*, 3 Vesey, 752.

² *Cox v. Parker*, 22 Beavan, 168. See also the elaborate note of Mr. Eden, 1 Eden, Ch. R. 259. See also *Smith v. Spencer*, 6 De G. M. & G. 631; *Peacock v. Stockford*, 7 De G. M. & G. 129; *Dunne v. Dunne*, 7 De G. M. & G. 207; *Ware v. Watson*, Id. 248.]

the grantee for the benefit of the grantor, as a resulting trust.¹ But if there be an express declaration, that it is to be in trust, or for the use of another person, nothing will be presumed against such a declaration. And if there be either a good or a valuable consideration, there equity will immediately raise a use or trust correspondent to such consideration,² in the absence of any controlling declaration or other circumstances.

§ 1198. This is in strict conformity to the rule of the common law, applied to resulting uses, which, indeed, were originally nothing but resulting trusts. Thus a feoffment, made without consideration, was, at a very early period of the common law, held to be made for the use of the feoffor.³ Lord Bacon after repudiating a distinction set up in *Dyer*, 146 *b*, assigning the origin of this doctrine to the time of the statute, *quia emptores*, said: "The intendment of an use to the feoffor, where the feoffment was made without consideration, grew long after, when uses waxed general; and for this reason: because, when feoffments were made, it grew doubtful whether the estates were in use or in purchase, because purchases were things notorious, and uses were things secret. The Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendments towards the use, and put the proof upon the purchaser."⁴ Be the origin of the doctrine, however, as it may, it is firmly established in equity jurisprudence in matters of trust. And it is not in any manner affected by the provisions of the statute of frauds of 29th Charles II. ch. 3; for that statute contains an express exception of "trusts arising by implication, and transferred and extinguished by acts of law."⁵

¹ 2 Black. Comm. 330; Bac. Abr. *Uses and Trusts* (1), *Id. Trusts* (C.); Com. Dig. *Chancery*, 4 W. 3. See also *Burgess v. Wheate*, 1 Eden, R. 206, 207; *Post*, § 1200.

² *Ibid.*; *Post*, § 1199.

³ *Ibid.*; *Dyer v. Dyer*, 2 Cox, R. 92, 93; *Post*, § 1201.

⁴ Bacon on *Uses*, 317; 2 Fonbl. Eq. B. 2, ch. 2, § 1, and note (*d*); *Id.* § 2, notes (*h*), (*i*).

⁵ Co. Litt. 290 *b*, Butler's note, § 8; Bac. Abr. *Trusts* (C.); *Lamplugh v. Lamplugh*, 1 P. Will. 112, 113; 2 Fonbl. Eq. B. 2, ch. 2, § 4, note (*m*); *Id.* ch. 5, § 5, note (*q*); *Ante*, § 972. In cases within the statute of 29 Charles II. ch. 3, it is not necessary that the trust should be in writing. It is sufficient if it is manifested and proved by writing, that is, there should be evidence in writing, proving that there was such a trust. Sugden on *Vendors*, ch. 15, § 1, p. 612 to 614 (7th edit.).

§ 1199. The same principle applies to cases, where a man makes a feoffment, or other conveyance, and parts with or limits a particular estate only, and leaves the residue undisposed of. In such a case the residue will result to the use of the feoffor or grantor, even though the feoffment or conveyance be made for a consideration. For it is the intent which guides the use; and, here, the party having expressly declared a particular estate of the use, the presumption is, that if he had intended to part with the residue, he would have declared that intention also.¹ This distinction, however, is to be observed in cases, where a consideration, although purely nominal, is stated in the deed. If no uses are declared, the grantee will take the whole use; and there will be no resulting use for the grantor; because the payment, even of a nominal consideration, shows an intent, that the grantee should have some use; and no other being specified, he must take the whole use. But, where a particular use is declared, there the residue of the use results to the grantor; for the presumption, that the grantor meant to part with the whole use, is thereby repelled.²

¹ 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (a); Id. § 4, notes (m), (n); Id. ch. 6, § 1, note (a); Co. Litt. 23; Shortridge v. Lamplugh, 2 Lord Raym. 798; S. C. 7 Mod. 71; Lloyd v. Spillet, 2 Atk. 149, 150; Pybus v. Mitford, 1 Vent. 372; Benbow v. Townsend, 1 Mylne & Keen, 506; Post, § 1202.

² Ibid. — As the doctrine of resulting uses and trusts is founded upon a mere implication of law, it may be proper here to observe, that parol evidence is generally admissible for the purpose of rebutting such resulting use or trust. See 2 Fonbl. Eq. B. 2, ch. 5, § 3, note (l), and cases there cited; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 86 to 94. See Benbow v. Townsend, 1 Mylne & Keen, 506; Post, § 1202; Cripps v. Lee, 4 Bro. Ch. R. 472. The late case of *Leman v. Whitney* (4 Russ. R. 422), stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence, as to resulting trusts. A son had conveyed an estate to his father nominally as purchaser for the consideration expressed in the deed of £400, but really as a trustee, in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards before any money was raised, having by his will made a general devise of all his real estate. The case was held by Sir John Leach to be within the statute of frauds, and that parol evidence was not admissible to prove the trust. On this occasion the learned judge said: "There is here no pretence of fraud, nor is there any misapprehension of the parties, with respect to the effect of the instruments. It was intended that the father should, by legal instruments, appear to be the legal owner of the estate. There is here no trust arising or resulting by the implication or construction of law. The case of *Cripps v. Lee* is the nearest to this case in its circumstances. There, the estate being subject to certain incumbrances, the grantor mortgaged the equity of redemption by deeds of lease and release to two persons of the name of

§ 1200. The same principle applies to cases where the whole of the estate is conveyed or devised, but for particular objects and purposes, or on particular trusts. In all such cases, if those objects or purposes or trusts, by accident or otherwise fail, and do not take effect; or, if they are all accomplished, and do not exhaust the whole property; there, a resulting trust will arise, for the benefit of the grantor or deviser and his heirs.¹

§ 1201. Upon similar grounds, where a man buys land in the name of another, and pays the consideration-money, the land will generally be held by the grantee in trust for the person who so pays the consideration-money.² This, as an established doctrine,

Rogers, as purchasers, for a consideration stated in the deed; the real intention of the parties being, that the Rogerses should be mere trustees for the grantor, and should proceed to sell the estate, and, after paying the incumbrances, should pay the surplus money to the grantor. In the book of accounts of one of the Rogerses, there appeared an entry, in his handwriting, of a year's interest paid to an incumbrancer on the estate, on an account of the grantor, and other entries of the repayment of that interest to Rogers by the grantor; and there was also evidence of a note and bond given by the Rogerses to a creditor of the grantor, in which they stated themselves to be trustees of the estate of the grantor. Lord Kenyon held, that this written evidence, being inconsistent with the fact that the Rogerses were the actual purchasers of the equity of redemption, further evidence was admissible to prove the truth of the transaction. Unfortunately there is here no evidence in writing which is inconsistent with the fact that the father was the actual purchaser of this estate; and it does appear to me that, to give effect to the trust here, would be in truth to repeal the statute of frauds. Considering myself bound, therefore, to treat this case as a purchase by the father from the plaintiff, there does, however, arise an equity for the plaintiff, which, consistently with the facts stated and proved, and under the prayer for general relief, he is entitled to claim. It is stated and proved that no part of the alleged price or consideration of £ 400 was ever paid by the father to the plaintiff; and the plaintiff, therefore, as vendor, has a lien on the estate for this sum of £ 400; and the decree must be accordingly." *Ante*, § 1196 *a*; *Squire v. Harder*, 1 Paige, R. 494.

¹ 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (a); *Id.* B. 2 ch. 8, § 2, note (a); *Cruse v. Barley*, 3 P. Will. 20, and Mr. Cox's note (1); *Ripley v. Waterworth*, 7 Ves. 425, 435; 2 Powell on Devises, by Jarman, ch. 3, p. 32 to 36, and ch. 5, p. 77 to 102; 4 Kent, Comm. Lect. 61, p. 307 (4th edit.); *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 2, p. 13; *Id.* p. 130, 131; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Hill v. Bishop of London*, 1 Atk. 618 to 620; *Robinson v. Taylor*, 1 Ves. Jr. 44; *S. C.* 2 Bro. Ch. R. 589; *Stanfield v. Habergham*, 10 Ves. 273; *Tregonwell v. Sydenham*, 3 Dow, R. 194; *Chitty v. Parker*, 2 Ves. Jr. 271; *Ante*, § 1156 to 1158, 1183.

² Com. Dig. *Chancery*, 3 W. 3; 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (a); 3 Wooddes. Lect. 57, p. 438, 439; Co. Litt. 290 *b*, Butler's note (T), § 8; Sugden on Vendors, ch. 15, § 2, p. 615 to 620 (7th edit.); Bac. Abr. *Uses* (I); *Id.* *Trust* (C);

is now not open to controversy. But there are exceptions to it, which stand upon peculiar reasons (to be presently noticed), and which are quite consistent with the general doctrine. The clear

Young v. Peachy, 2 Atk. 256; *Lloyd v. Spillet*, 2 Atk. 150, and Mr. Sanders's note (2); *Scott v. Fenhoulllet*, 1 Bro. Ch. R. 69, 70; *Lane v. Dighton*, Ambler, R. 409, 411; *Finch v. Finch*, 15 Ves. 50; *Mackreth v. Symmons*, 15 Ves. 350; *Wray v. Steele*, 2 V. & Beam. 388; 2 Madd. Ch. Pr. 98; *Boyd v. McLean*, 1 Johns. Ch. R. 582; *Botsford v. Burr*, 2 Johns. Ch. R. 405; *Steere v. Steere*, 5 Johns. Ch. R. 1; *Powell v. Monson and Brimfield Manufacturing Company*, 3 Mason, R. 362, 363; 4 Kent, Comm. Lect 61, p. 305, 306 (4th edit.); 2 Madd. Ch. Pr. 97, 98, 108; *Jackson v. Moore*, 6 Cowen, R. 706; *Jeremy on Eq. Jurisd. B*, 1 ch. 1, § 2, p. 85 to 94. — Mr. Sanders, in his note (2) to *Lloyd v. Spillet*, 2 Atk. 150, referring to this same position as it is there laid down by Lord Hardwicke, remarks: "With respect to this position, the following observations occur. If the consideration-money is expressed in the deed to be paid by the person, in whose name the conveyance is taken, and nothing appears in such conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted after the death of the nominal purchaser, to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries. *Kirk v. Webb*, Prec. Ch. 84; *Walter de Chirton's case*, Ibid. 88; *Heron v. Heron*, Ibid. 163; *Newton v. Preston*, Ibid. 103; *Gascoyne v. Thuring*, 1 Vern. 336; *Hooper v. Eyles*, 2 Vern. 480; *Crop v. Norton*, 2 Atk. 75. But if the nominal purchaser, in his lifetime, gives a declaration of, or confesses the trust, then it takes it out of the statute. *Ambrose v. Ambrose*, 1 P. Will. 322; *Ryall v. Ryall*, 1 Atk. 59, 60. In *Lane v. Dighton*, Ambl. R. 409, there was evidence in Mr. Dighton's handwriting, that the trust stocks had been sold, and the money laid out from time to time in the purchase of land. So, if it appears on the face of the conveyance (whether by recital or otherwise) that the purchase was made with the money of a third person, that will create a trust in his favor. *Kirk v. Webb*, Prec. Ch. 84; *Deg v. Deg*, 2 P. Will. 414; *Ryall v. Ryall*, 1 Atk. 59; *Young v. Peachy*, 2 Atk. 257." As to the proper proof of the payment of the purchase-money in such a case, Mr. Maddock, in his Treatise on the Principles and Practice in Chancery (vol. 2, p. 98), says: "Such proof may appear, either from expressions or recitals in the purchase-deed (see 2 Vern. 168; Prec. Ch. 104; *Kirk v. Webb*, Ibid. 84, cited 1 Sanders on Uses, p. 258) or from some memorandum or note of the nominal purchaser (*O'Hara v. O'Neal*, 2 Eq. Abr. 745); or from his answer to a bill of discovery (*Cottington v. Fletcher*, 2 Atk. 155; but see *Edwards v. Moore*, 4 Ves. 23, cited 1 Sand. 258); or from papers left by him, and discovered after his death (*Ryall v. Ryall*, Ambl. R. 413; *Lane v. Dighton*, Ibid. 409). But, whether, after the death of the supposed nominal purchaser, parol proof alone is admissible against the express declaration of the deed, has been a subject of controversy (see 1 Sand. on Uses, p. 259, and the note to *Lloyd v. Spillet*, 2 Atk. 150; *Roberts on Frauds*, p. 99; *Sugd. Vend. and Purch.* 616, 617 (7th edit.); 2 *Sugden on Vendors*, p. 136, 137 (9th edit.) although it seems it may). See *Lench v. Lench*, 10 Ves. 511." See also *Boyd v. McLean*, 1 Johns. Ch. R. 582, where the subject is very fully and learnedly discussed by Mr. Chancellor Kent, in his judgment. See also *Botsford v. Burr*, 2 Johns. Ch. R. 404; *Peabody v. Tarbell*, 2 Cush. R. 232.

result of all the cases, without a single exception, is (as has been well said by an eminent judge) that the trust of the legal estate, whether freehold, copyhold, or leasehold ; whether taken in the names of the purchaser and others jointly, or in the name of others, without the purchaser ; whether in one name or several ; whether jointly or successively (*successive*), results to the man who advances the purchase-money. This is a general proposition, supported by all the cases ; and there is nothing to contradict it. And it goes on a strict analogy to the rule of the common law, that, where a feoffment is made without consideration, the use results to the feoffor.¹ In truth, it has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another ; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties, for other collateral purposes. The same doctrine is applied to cases where securities are taken in the name of another person. As if A. takes a bond in the name of B., for a debt due to himself, B. will be a trustee of A. for the money.²

§ 1201 *a*. But the doctrine is strictly limited to cases where the purchase has been made in the name of one person, and the purchase-money has been paid by another. For, where a man employs another person by parol as an agent, to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase-money is paid by the principal ; there, if the agent denies the trust, and there is no written agreement or document establishing it, he cannot, by a suit in equity, compel the agent to convey the estate to him ; for (as has been truly said) that would be decidedly in the teeth of the statute of frauds.³

§ 1201 *b*. There is an exception to the doctrine of a resulting trust in favor of a purchaser, who pays the money, and takes the

¹ Lord Ch. Baron Eyre, in *Dyer v. Dyer*, 2 Cox, R. 92, 93 ; *Ante*, § 1198 ; 2 Sugden on Vendors, ch. 15, § 2, p. 134, 135 (9th edit.) ; *Id.* p. 615 to 617 (7th edit.) ; *Pinney v. Fellows*, 15 Verm. 538 ; *Botsford v. Burr*, 2 Johns. Ch. R. 405 to 410.

² *Ebrand v. Dancer*, 2 Ch. Cases, 26 ; S. C. 1 Eq. Abr. 382, pl. 11 ; 2 Madd. Ch. Pr. 101 ; *Lloyd v. Read*, 1 P. Will. 607 ; *Rider v. Kidder*, 10 Ves. 366.

³ *Bartlett v. Pickersgill*, 1 Eden, 515 ; S. C. 4 East, 577, note ; 2 Sugden on Vendors, ch. 15, § 2, p. 139 (9th edit.). See also *Rastell v. Hutchinson*, 1 Dick. 44 ; *Rex v. Boston*, 4 East, R. 572 ; *Crop v. Norton*, 2 Atk. 74 ; S. C. 9 Mod. R. 233 ; *Botsford v. Burr*, 2 Johns. Ch. R. 405, 408 to 410 ; *Post*, § 1206.

conveyance in the name of a third person, which stands upon a principle of public policy, and that is, that courts of equity will never raise a resulting trust, where it would contravene any statutable provisions founded in public policy, or would assist the parties in evading these provisions. Thus, if an alien, for the purpose of evading any law of a state, prohibiting aliens from holding real estate, should purchase land, and pay the money, and take a conveyance in the name of a third person, without any written declaration of trust, there, courts of equity would never raise or enforce a resulting trust in favor of the alien purchaser, in fraud of the rights of the state, or the law of the land.¹

§ 1202. But there are other exceptions to the doctrine of a resulting or implied trust, even where the principal has paid the purchase-money, as has been already intimated, or, perhaps, more properly speaking, as the resulting or implied trust is, in such cases, a mere matter of presumption, it may be rebutted by the other circumstances established in evidence, and even by parol proofs, which satisfactorily contradict it.² And resulting or implied trusts in such cases may, in like manner, be rebutted, as well to part of the land as to part of the interest in the land purchased in the name of another.³ Thus, where A. took a mortgage in the name of B., declaring that he intended the mortgage to be for B.'s benefit, and that the principal, after his own death, should be B.'s; and A. received the interest therefor during his lifetime; it was held that the mortgage belonged to B. after the death of A.⁴ But a more common case of rebutting the presumption of a trust is, where the purchase may be fairly deemed to be made for another from motives of natural love and affection. Thus, for example, if a parent should purchase in the name of a son, the purchase would

¹ *Leggett v. Dubois*, 5 Paige, R. 114.

² *Dyer v. Dyer*, 2 Cox, R. 93; 1 Eq. Abr. 3, pl. 1 to 5, p. 380, 381; *Lloyd v. Read*, 1 P. Will. 607; *Graham v. Graham*, 1 Ves. Jr. 275; *Maddison v. Andrew*, 1 Ves. 57, 61; Co. Litt. 290 b, Butler's note (1), § 8; *Ryall v. Ryall*, 1 Atk. 59; *S. C. Ambler*, R. 413; *Botsford v. Burr*, 2 Johns. Ch. R. 405; *Boyd v. McLean*, 1 Johns. Ch. R. 582; *Bartlett v. Pickersgill*, 1 Eden, R. 515; *Lench v. Lench*, 10 Ves. 517; *Sugden on Vendors*, ch. 15, § 2, p. 615 to 628 (7th edit.); *Com. Dig. Chancery*, 4 W. 4; *Benbow v. Townsend*, 1 Mylne & Keen, 506; *Cook v. Hutchinson*, 1 Keen, R. 42, 50, 51.

³ *Lane v. Dighton*, *Ambler*, R. 409; *Lloyd v. Spillet*, 2 Atk. 150; *Benbow v. Townsend*, 1 Mylne & Keen, 506; *Ante*, § 1199.

⁴ *Benbow v. Townsend*, 1 Mylne & Keen, 506; *Ante*, § 1199.

be deemed, *prima facie*, as intended as an advancement; so as to rebut the presumption of a resulting trust for the parent.¹ But this presumption, that it is an advancement, may be rebutted by evidence manifesting a clear intention, that the son shall take as a trustee.²

§ 1203. The moral obligation of a parent to provide for his children is the foundation of this exception, or rather of this rebutter of a presumption; since it is not only natural, but reasonable in the highest degree, to presume, that a parent, by purchasing in the name of a child, means a benefit for the latter, in discharge of this moral obligation, and also as a token of parental affection. This presumption in favor of the child, being thus founded in natural affection, and moral obligation, ought not to be frittered away by nice refinements.³ It is, perhaps, rather to be lamented, that it has been suffered to be broken in upon by any sort of evidence of a merely circumstantial nature.⁴

¹ Sidmouth v. Sidmouth, 2 Beavan, R. 447.

² Ibid.; Seawin v. Seawin, 1 Y. & Coll. New R. 65.

³ Finch v. Finch, 15 Ves. 50; Dyer v. Dyer, 2, Cox, R. 93, 94; 2 Fonbl. Eq. B. 2, ch. 5, § 2, and notes (d), (i); Lord Gray v. Lady Gray, 1 Eq. Abr. 381, pl. 6; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 88 to 90; Com. Dig. Chancery, 4 W. 4.

⁴ Lord Ch. Justice Eyre, in Dyer v. Dyer, 2 Cox, R. 92, has discussed this matter with great ability. "It is the established doctrine," said he, "of a court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove, that the circumstance of one or more nominees being a child or children of the purchaser, it is to operate by rebutting the resulting trust. And it has been determined in so many cases, that the nominee, being a child, shall have such operation, as a circumstance of evidence, that we should be disturbing landmarks, if we suffered either of these propositions to be called in question; namely, that such circumstances shall rebut the resulting trust, and that it shall so do, as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence, which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shows the father intended an advancement, and, therefore, the resulting trust is rebutted. But then a circumstance is added to this, namely, that the son happened to be provided for; then the question is, Did the father intend to advance a son already

§ 1204. The same doctrine applies to the case of securities taken in the name of a child. The presumption is, that it is intended as an advancement, unless the contrary is established in evidence.¹

provided for? Lord Nottingham could not get over this; and he ruled that, in such a case, the resulting trust was not rebutted; and in *Pole v. Pole*, in *Vesey*, Lord Hardwicke thought so too. And yet the rule in a court of equity, as recognized in other cases, is, that the father is the only judge as to the question of a son's provision. That distinction, therefore, of the son being provided for, or not, is not very solidly taken, or uniformly adhered to. It is then said, that a purchase in the name of a son is a *primâ facie* advancement; and, indeed, it seems difficult to put it in any way. In some of the cases some circumstances have appeared, which go pretty much against that presumption; as, where the father has entered and kept possession, and taken the rents; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father. The answer given is, that the father took the rents, as guardian of his son. Now, would the court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered, that these are subsequent acts; whereas the intention of the father, in taking the purchase in the son's name, must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said, that the son, being under age, he could not give receipts in any other manner. But I own this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be, that the first taken might surrender the whole lease, that shall make the other lessees trustees for him. But this custom operates on the legal estate, not on the equitable interest; and, therefore, this is not a very solid argument. When the lessees are to take *successive*, it is said, that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father. And, to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person. And if, in that case, it is to be collected from circumstances, whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent. But, where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name, as a circumstance of evidence only. Now, if it were once laid down, that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided." The cases are also fully collected in *Jeremy on Eq. Jurisd. B. 1, § 2, p. 89 to 92*. See *Cook v. Hutchinson*, 1 Keen, 42, 50.

¹ *Ebrand v. Dancer*, 2 Ch. Cas. 26; S. C. 1 Eq. Abr. 382, pl. 11; *Lloyd v. Read*, 1 P. Will. 607; *Rider v. Kidder*, 10 Ves. 366; 2 Madd. Ch. Pr. 101; *Scawin v. Scawin*, 1 Younge & Coll. New R. 65.

And the like presumption exists in the case of a purchase of a husband in the name of his wife, and of securities taken in her name.¹ Indeed, the presumption is stronger in the case of a wife than of a child; for she cannot, at law, be the trustee of her husband. The same rule applies to the case of a joint purchase by the husband, in the name of himself, his wife, and his daughters; and it will be presumed an advancement and provision for the wife and his daughter; and the husband and wife will be held to take one moiety by entirety, and the daughter to take the other moiety.²

§ 1205. Hence, also, it is, that where a purchase is made by a father in the joint names of himself and of a child, unprovided for, (whatever may be the case, as to a child otherwise provided for,) if the father dies, the child will hold the estate, and have the benefit thereof by survivorship against the heir at law of the father, and against all volunteers, claiming under the father, and also against purchasers from him with notice.³ So, where a father transferred stock from his own name into the joint names of his son, and of a person whom the father and son employed as their banker to receive dividends, and the father told the banker to carry the dividends, as they were received, to the son's account; and they were accordingly received and enjoyed by the son during his father's lifetime; it was held, that the transfer created an executive trust for the son, and that he was absolutely entitled to the stock.⁴

§ 1206. In the case of joint purchases, made by two persons, who advance and pay the purchase-money in equal proportions and take a conveyance to them and their heirs, it constitutes a joint tenancy, that is, a purchase by them jointly of the chance of survivorship; and of course the survivor will take the whole estate. This is the rule at law; and it prevails also in equity under the same circumstances; for unless there are controlling circumstances,

¹ See *Whitten v. Whitten*, 3 Cush. 194.

² 2 Fonbl. Eq. B. 2, ch. 5, § 3; *Back v. Andrew*, 2 Vern. R. 120; *Cook v. Hutchinson*, 1 Keen, R. 42, 50.

³ 2 Fonbl. Eq. B. 2, ch. 5, § 2, note (d). Mr. Atherly, in his *Treatise on Marriage Settlements*, ch. 33, p. 473 to 484, and Mr. Sugden, in his *Treatise on Vendors and Purchasers*, ch. 15, § 1, 2, p. 607 to 628 (7th edit.), have examined this whole subject with great care and ability; and the learned reader is referred to these works for a full statement of the doctrines and the cases. See also 2 Madd. Ch. Pr. 99, 100.

⁴ *Crabb v. Crabb*, 1 Mylne & Keen, 511; *Ante*, § 1149, 1202.

equity follows the law.¹ But, wherever such circumstances occur, courts of equity will lay hold of them to prevent a survivorship, and create a trust; for joint-tenancy is not favored in equity.² Thus, if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase-money, he will be entitled to his share as a resulting trust.³ So, if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage, but the representative of the deceased party shall have his proportion as a trust; for the nature of the transaction, as a loan of money, repels the presumption of an intention to hold the mortgage as a joint tenancy.⁴ So, if two persons jointly purchase an estate, and pay unequal proportions of the purchase-money, and take the conveyance in their joint names, in case of the death of either of them there will be no survivorship; for the very circumstance that they have paid the money in unequal proportions excludes any presumption that they intended to bargain for the chance of survivorship.⁵ They are, therefore, deemed to purchase, as in the nature

¹ *Lake v. Gibson*, 1 Eq. Abridg. p. 290, A. pl. 3; *Moyse v. Gales*, 2 Vern. 385; 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (g); *Sugden on Vendors*, ch. 17, § 1, p. 607 to 615 (7th edit.); 2 *Sugden on Vendors*, ch. 15, § 1, p. 127 to 132 (9th edit.); *Rigdon v. Vallier*, 2 Ves. 258; 2 Madd. Ch. Pr. 102. See also *Caines v. Lessee of Grant*, 5 Binn. R. 119.

² *Ibid.*; *Parteriche v. Powlet*, 1 West, R. 7; *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 2, p. 86; 2 Madd. Ch. Pr. 102.

³ *Wray v. Steele*, 2 Ves. & B. 388; *Buck v. Swasey*, 35 Maine, 49. Under the English Registry Acts in cases of a joint purchase of a ship by two persons, and the bill of sale taken in the name of one, no trust would arise in favor of the other. *Ex parte Houghton*, 17 Ves. 251; 2 Madd. Ch. Pr. 101, 102; *Ex parte Yallop*, 15 Ves. 60; *Abbott on Shipp.* Pt. 1, ch. 2, p. 33 to 35; 2 *Sugden on Vendors*, ch. 35, § 2, p. 139; 140 (9th edit.).

⁴ *Petty v. Styward*, 1 Ch. Rep. 31 [57]; S. C. 1 Eq. Abridg. 290, pl. 1; 2 Fonbl. Eq. B. 2, ch. 4, § 4, note (g); *Rigdon v. Vallier*, 2 Ves. 258; S. C. 3 Atk. 731; 2 *Powell on Mortg.* 671, by *Coventry & Rand*, and notes; *Randall v. Phillips*, 3 Mason, R. 378.

⁵ Mr. Vesey, in his note (b) to *Jackson v. Jackson*, 9 Ves. 597, 598, doubts the soundness of the distinction between an equality and an inequality of advances in the purchase of an estate by joint purchasers, as leading to a different conclusion, as to the right of survivorship. "If," says he, "the advance of consideration generally will not prevent the legal right, the mere inequality of proportion which may naturally be attributed to the relative value of the lives, ought not to have that effect." On the other hand, Mr. Sugden thinks the distinction satisfactory and well founded. "Where," says he, "the parties advance the money equally,

of partners, and to intend to hold the estate in proportion to the sums which each has advanced.¹

§ 1207. The same rule is uniformly applied to joint purchasers in the way of trade, and for the purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of, the great maxim of the common law : *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*² In cases, therefore, where real estate is purchased for partnership purposes, and on partnership account, it is wholly immaterial in the view of a court of equity, in whose name or names the purchase is made, and the conveyance is taken ; whether in the name of one partner, or of all the partners, whether in the name of a stranger alone, or of a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property, not subject to survivorship ; and the partners are deemed the *cestuis que trust* thereof.³ A

it may fairly be presumed, that they purchased with the view to the benefit of survivorship. But, where the money is advanced in unequal proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed. The inequality of proportion can scarcely be attributed to the relative value of the lives ; because neither of the parties can be supposed not to know that the other may, immediately after the purchase, compel a legal partition of the estate, or may sever the joint tenancy by a clandestine act." Sugden on Vendors, ch. 15, § 1, p. 607, note I. (7th edit.) ; S. P. and note ; 2 Sugden on Vendors, ch. 15, § 1, p. 127, 128, note I. (9th edit.). There is much force in these observations of the latter learned author. But the real ground of the distinction probably is, that joint tenancy is not favored in equity ; that, where there is nothing demonstrating an apparent intent to vary the rule of law, it must prevail ; so that in cases of equal advances no such intent is apparent. But that, where the advances are unequal, there is nothing in the transaction necessarily leading to the conclusion that the parties mean to follow the rule of law ; and then a court of equity is not bound to presume any intention to follow it ; since it may work an inequality in point of right and justice. In other words, a court of equity will not adopt a rule of law which has no foundation in general justice or convenience, unless it is compelled to do so by the absence of all circumstances which will enable it to control it. See *Ante*, § 1201.

¹ *Lake v. Gibson*, 1 Eq. Abridg. 290, A. pl. 3 ; *Rigden v. Vallier*, 2 Ves. R. 258 ; *Caines v. Grant's Lessee*, 5 Binn. 119. But see 2 Sugden on Vendors, p. 131 to 135 ; *Id.* 139 (9th edit.) ; the case of joint purchasers, where one pays all the money ; *Ante*, p. 445.

² Co. Litt. 182 a ; 2 Fonbl. Eq. B. 2, ch. 4, § 2, and note (h) ; *Lake v. Craddock*, 3 P. Will. 158 ; *Jackson v. Jackson*, 9 Ves. 591, 593, 597.

³ *Bell v. Phyn*, 7 Ves. 453 ; *Ripley v. Waterworth*, 7 Ves. 425, 435 ; *Town-*

court of law may, nay must, in general, view it only according to the state of the legal title. And if the legal title is vested in one partner, or in a stranger, a *bonâ fide* purchaser of real estate from him, having no notice, either express or constructive, of its being partnership property, will be entitled to hold it free from any claim of the partnership.¹ But if he has such notice, then in equity he is clearly bound by the trust; and he takes it *cum onere*, exactly like every other purchaser of a trust estate.²

§ 1207 *a*. But although, generally speaking, whatever is purchased with partnership property, to be used for partnership purposes, is thus treated as a trust for the partnership, in whose name the purchase may be made; yet there may be cases in which, from the nature of the thing purchased, the partner in whose name it is purchased, may, upon a dissolution of the partnership, be entitled to hold it as its own, so that it will be trust property *sub modo* only. Thus, for example, an office may be purchased, or a license be obtained in the name of a partner out of the partnership funds (as for example, a stockbroker's license, or the office of a clerk in court), to be used during the continuance of the partnership for partnership purposes, by the person obtaining the same. But it will not follow, that, upon the dissolution of the partnership, such partner is to hold the same, and act as a stockbroker, or clerk in court, performing all the duties alone for the benefit of the other partners.³

§ 1208. Another illustration of the doctrine of implied and resulting trusts arises from the appointment of an executor of a last will and testament. In cases of such an appointment the executor is entitled, both at law and in equity, to the whole surplus of the personal estate, after payment of all debts and charges, for his

send *v. Devaynes*, *Montague on Partn.* 97, in note; *Balmain v. Shore*, 9 Ves. 500; *Lake v. Craddock*, 3 P. Will. 158; *S. C. Sugden on Vendors*, ch. 15, p. 607 to 614 (7th edit.); *Jackson v. Jackson*, 9 Ves. 591, 593, 594, 597; *Selkirk v. Davies*, 2 Dow, R. 231; *Collyer on Partn. B.* 2, ch. 1, § 1, art. 4, p. 68 to 70; *Hoxie v. Carr*, 1 Sumner, R. 182 to 186; *Ante*, 674, 675; *Fawcett v. Whitehouse*, 1 Russ. & Mylne, 132.

¹ *Ibid.*

² *Ibid.*; and especially *Hoxie v. Carr*, 1 Sumner, R. 182, 183. — We have already seen (*Ante*, § 674) that such real estate, belonging to a partnership, is generally, if not universally, treated as personal property of the partnership. *Ante*, § 675; *Post*, § 1243, 1253.

³ *Clarke v. Richards*, 1 Younge & Coll. 351, 384, 385.

own benefit, unless it is otherwise disposed of by the testator.¹ The inclination of courts of equity has been strongly evinced to lay hold of any circumstances which may rebut the presumption of such a gift to the executor; and some very nice and curious distinctions have been taken in England, in order to escape from the operation of the general rule. In America, the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator; and, therefore, it is scarcely necessary to present these distinctions at large. In general it may be stated, that, at law, the appointment of an executor vests in him all the personal estate of the testator; and the surplus, after the payment of all debts, will belong to him. But, in equity, if it can be collected from any circumstance or expression in the will, that the testator intended his executor to have only the office and not the beneficial interest, such intention will receive effect, and the executor will be deemed a trustee for those on whom the law would have cast the surplus, in cases of a complete intestacy.²

¹ 2 Madd. Ch. Pr. 83 to 85; 2 Fonbl. Eq. B. 2, ch. 2, § 5, note (k); Jeremy on Eq. B. 1, ch. 1, § 2, p. 122 to 129.

² 2 Fonbl. Eq. B. 2, ch. 5, § 3, note (k); *Ante*, § 1065; 2 Madd. Ch. Pr. 83, 84. Mr. Fonblanque has collected most of the distinctions on this subject in his learned note (k) above referred to. The following extract is made from that note, as every way useful to students. "The cases," says he, "upon the subject are numerous, and not easily reconcilable. I will, however, endeavor to extract the several rules which have governed their decision. 1. As the exclusion of the executor from the residue is to be referred to the presumed intention of the testator, that he should not take it beneficially, an express declaration, that he should take as trustee, will of course exclude him; *Pring v. Pring*, 2 Vern. 99; *Graydon v. Hicks*, 2 Atk. 18; *Wheeler v. Sheers*, *Moseley*, 288, 301; *Dean v. Dalton*, 2 Bro. Ch. R. 634; *Bennet v. Bachelor*, 3 Bro. Ch. 28; 1 Ves. Jr. 63; and the exclusion of one executor as a trustee will consequently exclude his co-executor; *White v. Evans*, 4 Ves. 21, unless there be evidence of a contrary intention; *Williams v. Jones*, 10 Ves. 77; *Pratt v. Sladden*, 14 Ves. 193; *Dawson v. Clark*, 15 Ves. 416; and see *Dalton v. Dean*, to show, that a direction to reimburse the executors their expenses is sufficient to exclude them. 2 Bro. R. 634. 2. Where the testator appears to have intended by his will to make an express disposition of the residue, but by some accident or omission such disposition is not perfected at the time of his death, as, where the will contains a residuary clause, but the name of the residuary legatee is not inserted, the executor shall be excluded from the residue. *Bp. of Cloyne v. Young*, 2 Ves. 91; *Lord North v. Pardon*, 2 Ves. 495; *Hornsby v. Finch*, 2 Ves. Jr. 78; *Oldham v. Carleton*, 2 Cox, R. 400. 3. Where the testator has by his will disposed of the residue of his property, but, by the death of the residuary legatee, in the lifetime of the testator, it is undisposed

§ 1209. In like manner, at law, a testator, by the appointment of his debtor to be his executor, extinguishes his debt, and it can-
of at the time of the testator's death. *Nichols v. Crisp*, Amb. 769; *Bennet v. Bachelor*, 3 Bro. Ch. R. 28. 4. The next class of cases in which an executor shall be excluded from the residue, is, where the testator has given him a legacy expressly for his care and trouble, which, as observed by Lord Hardwicke in *Bp. of Cloyne v. Young*, 2 Ves. 97, is a very strong case for a resulting trust, not on the foot of giving all and some, but that it was evidence that the testator meant him, as a trustee for some other, for whom the care and trouble should be, as it could not be for himself; *Foster v. Munt*, 1 Vern. 473; *Rachfield v. Careless*, 2 P. Will. 157; *Cordel v. Noden*, 2 Vern. 148; *Newstead v. Johnstone*, 2 Atk. 46. 5. Though the objection to the executor's taking part and all has been thought a very weak and insufficient ground for excluding him from the residue, as the testator might intend the particular legacy to him in case of the personal estate falling short, yet it has been allowed to prevail; and it is now a settled rule in equity, that, if a sole executor has a legacy generally and absolutely given to him (for if given under certain limitations, which will be hereafter considered, it will not exclude), he shall be excluded from the residue; *Cook v. Walker*, cited 2 Vern. 676; *Joslin v. Brewitt*, Bunb. 112; *Davers v. Dewes*, 3 P. Will. 40; *Farrington v. Knightly*, 1 P. Will. 544; *Vachell v. Jeffries*, Prec. Ch. 170; *Petit v. Smith*, 1 P. Will. 7. Nor will the circumstance of the legacy being specific be sufficient to entitle him; *Randall v. Bookey*, 2 Vern. 425; *Southcot v. Watson*, 3 Atk. 229; *Martin v. Rebow*, 1 Bro. Ch. R. 154; *Nesbit v. Murray*, 5 Ves. 149. Nor will the testator's having bequeathed legacies to his next of kin vary the rule; *Bayley v. Powell*, 2 Vern. 361; *Wheeler v. Sheers*, *Moseley*, 288; *Andrew v. Clark*, 2 Ves. 162; *Kennedy v. Stainsby*, E. 1755, stated in a note, 1 Ves. Jr. 66; for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for his next of kin; and, therefore, if there be no next of kin, a trust shall result for the crown; *Middleton v. Spicer*, 1 Bro. Ch. R. 201. 6. Where the testator appears to have intended to dispose of any part of his personal estate; *Urquhart v. King*, 7 Ves. 225. 7. Where the residue is given to the executors, as tenants in common, and one of the executors dies, whereby his share lapses, the next of kin, and not the surviving executors, shall have the lapsed share; *Page v. Page*, 2 P. Will. 489; 1 Ves. Jr. 66, 542. With respect to co-executors, they are clearly within the first three stated grounds, on which a sole executor shall be excluded from the residue. And as to the fourth ground of exclusion, it seems to be now settled, that a legacy, given to one executor, expressly for his care and trouble, will, though no legacy be given to his co-executor, exclude; *White v. Evans*, 4 Ves. 21. As to the fifth ground of exclusion of a sole executor, several points of distinction are material in its application to co-executors. A sole executor is excluded from the residue by the bequest of a legacy, because it shall not be supposed that he was intended to take part and all. But, if there be two or more executors, a legacy to one is not within such objection; for the testator might intend a preference to him *pro tanto*; *Colesworth v. Brangwin*, Prec. Ch. 323; *Johnson v. Twist*, cited 2 Ves. 166; *Buffar v. Bradford*, 2 Atk. 220. So, where several executors have unequal legacies, whether pecuniary or specific, they shall not be thereby excluded from the residue; *Brasbridge v.*

not be revived; although a debt due by an administrator would only be suspended. The reason of the difference is, that the one is the act of the law, and the other is the act of the party.¹ But in equity a debt due by an executor is not extinguished; and it will go to the same party who would be entitled to the surplus estate, if the debt were due from a third person.²

§ 1210. Another illustration of the doctrine of implied trusts arises from acts done by trustees, apparently within the scope and objects of their duty. Thus, for instance, if a trustee, authorized to purchase lands for his *cestuis que trust*, or beneficiaries, should purchase lands with the trust money, and take the conveyance in his own name, without any declaration of the trust, a court of equity would, in such a case, deem the property to be held as a resulting trust for the persons beneficially entitled thereto.³ For, in such a case, a court of equity will presume, that the party meant

Woodroffe, 2 Atk. 69; Bowker v. Hunter, 1 Bro. Ch. R. 328; Blinkhorn v. Feast, 2 Ves. 27. But, where equal pecuniary legacies are given to two or more executors, a trust shall result for those on whom, in case of an intestacy the law would have cast it. *Petit v. Smith*, 1 P. Will. 7; *Carey v. Goodinge*, 3 Bro. Ch. R. 110; *Muckleston v. Brown*, 6 Ves. 64. But see *Heron v. Newton*, 9 Mod. 11. Qu. Whether distinct, specific legacies, of equal value to several executors, will exclude them? It now remains to consider, in what cases an executor shall not be excluded from the residue. Upon which it may be stated, as a universal rule, that a court of equity will not interfere to the prejudice of the executor's legal right, if such legal right can be reconciled with the intention of the testator, expressed by, or to be collected from, his will. And, therefore, even the bequest of a legacy to the executor shall not exclude, if such legacy be consistent with the intent, that the executor shall take the residue; as, where a gift to the executor is an exception out of another legacy. *Griffith v. Rogers*, Prec. Ch. 231; *Newstead v. Johnstone*, 2 Atk. 45; *Southcot v. Watson*, 3 Atk. 229. Or where the executorship is limited to a particular period, or determinable on a contingency, and the thing bequeathed to the executor, upon such contingency taking place, is bequeathed over. *Hoskins v. Hoskins*, Prec. Ch. 263. Or where the gift is only a limited interest, as for the life of the executor. *Lady Granville v. Duchess of Beaufort*, 1 P. Will. 114; *Jones v. Westcombe*, Prec. Ch. 316; *Nourse v. Finch*, 1 Ves. Jr. 356. Or where the wife is executrix, and the bequest is of her paraphernalia. *Lawson v. Lawson*, 7 Bro. P. C. 521; *Ball v. Smith*, 2 Vern. 675; 3 Wooddes. Lect. 59, p. 495 to 503."

¹ *Hudson v. Hudson*, 1 Atk. 461.

² *Ibid.*; 3 Wooddes. Lect. 49, p. 504, 505; *Phillips v. Phillips*, 1 Ch. Cas. 292; *Brown v. Selwin*, Cas. T. Talbot, 240.

³ 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (c); *Deg v. Deg*, 2 P. Will. 414; *Sugden on Vendors*, ch. 15, § 3, p. 628 to 630 (7th edit.); *Lane v. Dighton*, Ambler, R. 409; *Perry v. Phillips*, 4 Ves. R. 107; *S. C.* 17 Ves. 173; *Bennet v. Mayhew*, cited 1 Bro. Ch. R. 232; 2 Bro. Ch. R. 287.

to act in pursuance of his trust, and not in violation of it. So where a man has covenanted to lay out money in the purchase of lands, or to pay money to trustees to be laid out in the purchase of lands, if he afterwards purchases land to the amount, they will be affected with the trust; for it will be presumed, at least until the contrary absolutely appears, that he purchased in fulfilment of his covenant.¹ In every such case, however, it must be clear, that the land has been paid for out of the trust money; and if this appears, a trust will be implied, not only, when the party may be presumed to act in execution of the trust, but, even, when the investment is in violation of the trust. For, in every such case, where the trust money can be distinctly traced, a court of equity will fasten a trust upon the land in favor of the persons beneficially entitled to the money.²

§ 1211. Upon grounds of an analogous nature, the general doctrine proceeds, that, whatever acts are done by trustees in regard to the trust property, shall be deemed to be done for the benefit of the *cestui que trust*, and not for the benefit of the trustee.³ If,

¹ Ibid.; Sowden v. Sowden, 1 Cox, R. 165; S. C. 1 Bro. Ch. R. 582; Wilson v. Foreman, 1 Dick. 593; S. C. cited and commented on in 10 Ves. 519; Lench v. Lench, 10 Ves. 516; Gartshore v. Chalie, 10 Ves. 9; Lewis v. Madocks, 17 Ves. 58; Perry v. Phellips, 17 Ves. 173; Savage v. Carroll, 1 B. & Beatt. 265; Waite v. Horwood, 2 Atk. 159; Sugden on Vendors, ch. 15, § 3, p. 628 to 630 (7th edit.); Id. § 4, p. 630 to 634; Atherley on Marr. Sett. ch. 28, p. 412 to 415; Id. p. 434 to 442.

² Ibid.; Taylor v. Plumer, 3 M. & Selw. 562; Cunard v. Atlantic Insurance Co. 1 Peters, S. S. R. 448; Liebman v. Harcourt, 2 Meriv. 513; Chedworth v. Edwards, 8 Ves. 46; S. C. 1 Madd. Ch. P. 128, note (e); Ryall v. Ryall, 1 Atk. 59; S. C. Ambler, R. 412, 413; Lane v. Dighton, Ambler, R. 409; Atherley on Marr. Sett. ch. 28, p. 442 to 444; Bennett v. Mayhew, cited 1 Bro. Ch. R. 232, 2 Bro. Ch. R. 287; Buckeridge v. Glasse, 1 Craig & Phillips, 126. In the case of a purchase of land by a trustee in his own name, in pursuance of the trust, the *cestui que trust* is entitled to the estate. But, where it is purchased with trust money, in violation of the trust, Mr. Atherley is of opinion, that the *cestui que trust* has a lien only on the estate, and not a right to the estate. There is much sound sense in the distinction; but he admits that Bennett v. Mayhew is apparently against it. Atherley on Marr. Sett. ch. 28, p. 443, 444. It is of course to be understood, that the *cestui que trust* is not in any case, where the trust money is invested in lands or other things in fraud or breach of the trust, bound to take the land, or to insist on his lien. He has an election to do so or not. Ibid.; Oliver v. Piatt, 3 How. Sup. Ct. R. 333.

³ Ante, § 322; 4 Kent, Comm. Lect. 61, p. 306, 307 (3d edit.); Davoue v. Fanning, 2 Johns. Ch. R. 252.

therefore, the trustee makes any contract, or does any act in regard to the trust estate for his own benefit, he will, nevertheless, be held responsible therefor to the *cestui que trust*, as upon an implied trust. Thus, for example, if a trustee should purchase a lien or mortgage on the trust estate at a discount, he would not be allowed to avail himself of the difference; but the purchase would be held a trust for the benefit of the *cestui que trust*.¹ So, if a trustee should renew a lease of the trust estate, he would be held bound to account to the *cestui que trust* for all advantages made thereby.² And, if a trustee should misapply the funds of the *cestui que trust*, the latter would have an election either to take the security, or other property in which the funds were wrongfully invested, or to demand repayment from the trustee of the original funds.³

§ 1211 *a*. The same principle will apply to persons standing in other fiduciary relations to each other. Thus, for example, if an agent, who is employed to purchase for another, purchases in his own name, or for his own account, he will be held to be a trustee of the principal at the option of another.⁴ So, if he is employed to purchase up a debt of his principal, and he does so at an under-value or discount, the principal will be entitled to the benefit thereof, in the nature of a trust.⁵ In this predicament sureties are also held to be, who purchase up the securities of the principal, on which they are sureties; and the principal will be entitled to the benefit of every such purchase at the price given for them.⁶

§ 1212. Another class of cases, illustrating the doctrine of implied trusts, is, that which embraces what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible, and descendible, according to its new character, as it arises

¹ *Green v. Winter*, 1 Johns. Ch. R. 26; *Morret v. Paske*, 2 Atk. 54; *Forbes v. Ross*, 2 Bro. Ch. R. 430; *Van Horn v. Fonda*, 5 Johns. Ch. R. 409; *Eveston v. Tappan*, 5 Johns. Ch. R. 514.

² *Holdridge v. Gillespie*, 2 Johns. Ch. R. 30; *Griffin v. Griffin*, 1 Sch. & Lefr. 352; *James v. Dean*, 11 Ves. 392; *Nesbitt v. Tredenick*, 1 B. & Beatt. 46, 47; *Wilson v. Troup*, 2 Cowen, R. 195.

³ *Steele v. Babcock*, 1 Hill, N. Y. Rep. 527; *Boyd's case*, 1 De G. & J. 223.

⁴ *Ante*, § 316; *Lees v. Nuttall*, 1 Russ. & Mylne, 53; *S. C. Tamlyn's Rep.* 382; *Carter v. Palmer*, 11 Bligh, R. 397, 418, 419. But see *Ante*, § 1201 *a*.

⁵ *Ibid*.

⁶ *Ante*, § 316; *Reed v. Norris*, 2 Mylne & Craig, 361, 374.

out of the contracts, or other acts and intentions, of the parties. This change is a mere consequence of the common doctrine of courts of equity, that, where things are agreed to be done, they are to be treated for many purposes as if they were actually done.¹ Thus, (as we have already had occasion to consider,) where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee for the vendee of the real estate; and the vendee is deemed a trustee for the vendor of the purchase-money. Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and descendible, as his real estate. On the other hand, the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him, as other personalty, and is distributable in the same manner on his death.² So, land, articted to be sold and turned into money, is reputed money; and money, articted or bequeathed to be invested in land, is ordinarily deemed to be land.³

§ 1213. So, if money is devised to be laid out in the purchase of land, which is to be settled on one of his heirs, the person for whose benefit the purchase is to be made, may come into a court of equity, and have the money paid to him without any purchase of the land; for he has a complete title to the same as owner.⁴ But,

¹ See *Pulteney v. Darlington*, 1 Bro. Ch. R. 237; *Burgess v. Wheate*, 1 Eden, R. 186, 194, 195; 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (t) and *Ante*, § 61 a, 789, 790, and note (1); Com. Dig. *Chancery*, 4 W. 10.

² *Ante*, § 789 to 792, and note (1) to § 790; *Craig v. Leslie*, 3 Wheat. R. 577; *Beverly v. Peter*, 10 Peters, R. 532, 533.

³ *Ante*, § 790, and note (1); 3 Wooddes. Lect. 58, p. 466 to 468; 2 Madd. Ch. Pr. 108 to 110; Sugden on Vendors, ch. 4, § 1, p. 160 (7th edit.); 1 Fonbl. Eq. B. 1, ch. 6, § 9, and notes (s), (t); Id. B. 1, ch. 4, § 2, note (n); *Atherley on Marr. Sett.* ch. 28, p. 428 to 430; *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 2, p. 95; *Fletcher v. Ashburner*, 1 Bro. Ch. R. 497, and Mr. Belt's note. The parties may elect to treat it otherwise, if they choose. *Ante*, § 793, and note (1). This subject of equitable conversion is treated very fully in Leigh and Dalzell's *Treatise on the equitable doctrine of the conversion of property*. See also 2 Fonbl. Eq. B. 2, ch. 8, § 2, and note (a); *Ante*, note (1) to § 790, and the very valuable note of Mr. Cox to *Cruse v. Barley*, 3 P. Will. 22, note (1); 2 Powell on Devises, by Jarman, ch. 4, p. 60 to 76; 2 Madd. Ch. Pr. 108 to 112. Lord Thurlow was of opinion against the original propriety of the doctrine. After quoting what he called the cant expression, that, in equity, what is to be done is considered as done, he added: "Either that idea should have been carried fully out, or it should have been abandoned. I think it should have been the latter." See Com. Dig. *Chancery*, 4 W. 10, 4 W. 15, 16.

⁴ *Ante*, § 790, 793; *Post*, § 1250.

if he should die before any purchase is made, or the money is paid, so that the question comes between his heir or devisee, and executors or administrators, which of them shall have the money; in such a case courts of equity will decree it to the heir or devisee, precisely as if the land had been purchased in his lifetime, upon the ground above stated.¹

§ 1213 *a.* So, if real estate be charged with the payment of debts, so far as may be necessary for the payment of such debts, it will be treated as converted into personal estate. But unless the testator or other party has indicated a different intention, the real estate will not be deemed converted out and out, but it will retain its character of realty, so far as the charge does not extend, until it is actually converted.²

§ 1214. In general, courts of equity do not incline to interfere to change the quality of the property, as the testator or intestate has left it, unless there is some clear act or intention, by which he has unequivocally fixed upon it throughout a definite character, either as money or as land. For (it has been said) there is not a spark of equity between the next of kin and the heir, as to the right of property in such cases; and, therefore, the general principle adopted is, that the heir shall take all the property, which has attached to it the quality of real estate, if there is not some other definite and specific purpose, to which it is entirely devoted.³

§ 1214 *a.* What circumstances do or do not amount to proof of an absolute intention to convert real property into personal, or personal into real property, is sometimes a question of nice consideration and intrinsic difficulty. Thus, where a testatrix devised a real estate, and afterwards sold it, and the purchase was not completed until after her death, the question arose, to whom the purchase-money belonged, whether to her personal representatives or to the devisee, and it was held that it belonged to the former, notwithstanding the statute of 1 Victoria, ch. 23, § 23, respecting wills.⁴ So, where A. contracted to sell a real estate, and the contract was valid at the time of his death; but the purchaser by his

¹ Fonbl. Eq. B. 2, ch. 8, § 2, and note (*a*); Id. § 3.

² Bourne v. Bourne, 2 Hare, R. 35, 38.

³ Chitty v. Parker, 2 Ves. Jr. 271; Cruse v. Barley, 3 P. Will. 20, and Mr. Cox's note (1); 2 Fonbl. Eq. B. 2, ch. 8, § 2, note (*a*); *Ante*, § 790 to 794.

⁴ Fanar v. Earl of Winterton, 5 Beavan, R. 1, 8. In this case Lord Langdale said: "The question, whether the devisees can have any interest in that part of the purchase-money which was unpaid, depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial in-

laches lost his right of a specific performance, it was held, that the real estate belonged to the next of kin as personal estate, and not to the heir at law.¹

§ 1215. Equitable liens are such as exist in equity, and of which courts of equity alone take cognizance. A lien (as has been already said²) is not, strictly speaking, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.

§ 1216. At law, a lien is usually deemed to be a right to possess and retain a thing, until some charge upon it is paid or removed.³ There are few liens which at law exist in relation to real estate. The most striking of this sort undoubtedly is, the lien of a judgment creditor upon the lands of his debtor. But this is not a specific lien on any particular land, but it is a general lien over all the real estate of the debtor, to be enforced by an *elegit* or other legal process upon such part of the real estate of the debtor as the creditor may elect.⁴ The lien itself is treated as a consequence of the right to take out an *eligit*; and it is applied not only to present real estate in possession, but also to reversionary interests in real estate.⁵ In respect to personal property, a lien is generally, (perhaps, in all cases, with the exception only of certain maritime liens, such as seamen's wages, and bot-

terest. In equity she had alienated the land, and instead of her beneficial interest in the land, she had acquired a title to the purchase-money. What was really hers in right and in equity was not the land but the money, of which alone she had a right to dispose; and though she had a lien upon the land and might have refused to convey till the money was paid, yet that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition; but was, by her act, wholly vested in another, at the time of her death; and the case is clearly distinguishable from cases in which testators, notwithstanding conveyances made after the dates of their wills, have retained estates or interests in the property which remain subject to their disposition.

¹ *Curre v. Bowyer*, 5 Beavan, R. 6, note; *Moor v. Rainsbeck*, 12 Simons, 139.

² *Ante*, § 506; *Brace v. Duchess of Marlborough*, 2 P. Will. 491; *Ex parte Knott*, 11 Ves. 617.

³ *Ante*, § 406; *Ex parte Heywood*, 2 Rose, Cas. 355, 357.

⁴ *Averell v. Wade*, 1 Lloyd & Goold's Rep. 252.

⁵ *United States v. Morrison*, 4 Peters, R. 124; *Harris v. Pugh*, 4 Bing. R. 335; *Burton v. Smith*, 13 Peters, R. 464; *Gilbert on Executions*, 38 39: 2 *Tidd on Practice* (9th edit.) 1034

tomry bonds,) recognized at law to exist only when it is connected with the possession, or the right to possess, the thing itself. Where the possession is once voluntarily parted with, the lien is ordinarily, at law, gone.¹ Thus, the lien on goods for freight, the lien for the repairs of domestic ships, and the lien on goods for a balance of accounts, are all extinguished by a voluntary surrender of the thing to which they are attached.² Liens at law generally

¹ *Heywood v. Waring*, 4 Campb. R. 291; *Story on Bailm.* § 440; *Hollis v. Claridge*, 4 Taunt. R. 807; *Chase v. Westmore*, 5 M. & Selw. 180; *Hanson v. Meyer*, 6 East, R. 614; *Hartley v. Hitchcock*, 1 Starkie, R. 408. Lord Ellenborough (in *Heywood v. Waring*, 4 Campb. R. 295) said: "Without possession there can be no lien. A lien is a right to hold. And how can that be held which was never possessed?" Even at the common law there may be a right approaching to a lien without possession or personal property. This has been recently held, in the case of *Dodsley v. Varley*, 12 Adolph. & Ellis, R. 632, where Lord Denman, in delivering the opinion of the court, said: "The facts were, that the wool was bought while at the plaintiff's; the price was agreed on, but it would have to be weighed; it was then removed to the warehouse of a third person, where Bamford collected the wools, which he purchased for defendant from various persons, and to which place the defendant sent sheeting for the packing up of such wools. There it was weighed, together with the other wools, and packed, but it was not paid for. It was the usual course for the wool to remain at this place until paid for. No wish was expressed to take the opinion of the jury on the fact of agency, the defendant's counsel acquiescing in that of the judge, provided the circumstances would amount to it in point of law. We agree that they might; therefore, all these must be taken to be the acts of the defendant. Then, he has removed the plaintiff's wool to a place of deposit for his own wools; he has weighed it with his other purchases of wools; he has packed it in his own sheeting; everything is complete but the payment of the price. It was argued, that because, by the course of dealing, he was not to remove the wool to a distance before payment of the price, the property had not passed to him, or that the plaintiff retained such a lien on it as was inconsistent with the notion of an actual delivery. We think that, upon this evidence, the place to which the wools were removed must be considered as the *defendant's* warehouse, and that he was in actual possession of it there, as soon as it was weighed and packed; that it was thenceforward at his risk, and, if burnt, must have been paid for by him. Consistently with this, however, the plaintiff had, not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to, and actual receipt by him."

² *Abbott on Shipp.* Pt. 2, ch. 3, § 10; *Id.* Pt. 3, ch. 1, § 7, p. 171; *Ex parte Deez*, 1 Atk. 228; *Ex parte Shank*, 1 Atk. 234; *Franklin v. Hosier*, 4 Barn. & Ald. 341; *Ex parte Bland*, 2 Rose, Cas. 91.

arise, either by the express agreement of the parties, or by the usage of trade, which amounts to an implied agreement, or by mere operation of law.¹

§ 1216 *a*. In enforcing liens at law, courts of equity are, in general, governed by the same rules of decision as courts of law, with reference to the nature, operation, and extent of such liens.² But in some special cases, courts of equity will give aid to the enforcement and satisfaction of liens in a manner utterly unknown at law. Thus, at law, a creditor is only entitled to have a moiety of the lands of the judgment debtor extended upon an elegit, and must wait, until he can be reimbursed for the amount of his judgment out of the rents and profits. But where the payment of the judgment cannot be attained at all by a mere application of the rents and profits, (as if the interest upon the judgment exceeds the annual rents and profits,) or where the payment cannot be obtained out of the rents and profits within a reasonable time, courts of equity will accelerate the payment by decreeing a sale of the moiety of the lands; for it would be a gross injustice to the judgment creditor to compel him to wait for satisfaction of his debt out of the assets of his debtor for an unreasonable length of time, when he had a clear lien on the property for the full amount.³ For the same reason, courts of equity will accelerate payment by directing a sale, where the real estate, bound by the judgment, is a mere dry reversion; for, in such a case, there must, or, at least, there may unavoidably be a long delay, before the party can be paid out of the rents and profits.⁴

§ 1216 *b*. Courts of equity will also enforce the security of a judgment creditor against the equitable interest in the freehold estate of his debtor, treating the judgment as in the nature of a lien upon such equitable interest. But in all cases of this sort, the judgment creditor must have pursued the same steps, as he would have been obliged to do, to perfect his lien, if the estate had

[¹ *Post*, § 1240, 1241.

² *Gladstone v. Birley*, 2 Meriv. R. 403; *Oxenham v. Esdaile*, 2 Younge & Jer. 500; *Leeds v. Marine Insurance Company*, 6 Wheat. R. 565.

³ *Stileman v. Ashdown*, Ambler, R. 13; S. C. 2 Atk. 477, 608; *Burton v. Smith*, 13 Peters, R. 464; 2 Tidd's Pract. (9th edit.), 935; *O'Gorman v. Comyn*, 2 Sch. & Lefr. 137, 150; *Tennent's Heirs v. Patton*, 6 Leigh, R. 196.

⁴ *Ibid.*; *Coutts v. Walker*, 2 Leigh, R. 268; *Burton v. Smith*, 13 Peters, R. 464. See also *Robinson v. Tonge*, 3 P. Will. 398, 401; *Tyndale v. Warre*, Jacob, R. 212; *Ante*, § 1064 *a*.

been legal. Thus, for example, it is necessary for the judgment creditor to sue out an *elegit*, at law, before his lien will be treated as complete. If, therefore, he seeks relief in equity against the equitable freehold estate of his debtor, it is equally indispensable for him first to sue out an *eligit*; for, until that time, he has not made a final election. And not only must the suing out of an *eligit* be proved, but it must also be averred in the bill, otherwise the latter will be demurrable.¹

¹ *Neate v. Duke of Marlborough*, 3 Mylne & Craig, 407, 415. On this occasion, Lord Cottenham said: "In the first place, I find Lord Redesdale not only laying it down that it is necessary that the judgment creditor, suing in this court, should have issued an *elegit*, but expressly saying that, if that is not done, it is a ground of demurrer. And there was great force in the argument at the bar, that though his lordship's attention had been distinctly called to the point, yet, when a subsequent edition of his *Treatise on Pleading* was published, and, as I have always understood, under his superintendence, the same passage was preserved. I also find Lord Lyndhurst stating it as a general rule, though that was not the point on which the decision of the appeal before him was to turn, that an *elegit* is necessary. For myself, I never entertained the least doubt of it; and, certainly, though I have not had particular occasion to look into the question, if I had been asked what the rule of the court was, I should at once have answered, that, when a party comes here as a judgment creditor, for the purpose of having the benefit of his judgment, he must have sued out execution upon the judgment. And, in all the authorities referred to, though in some of them the distinction appears to be so far taken, that in the case of a *feri facias*, the creditor must go the whole length of having a return, there is no case, except the solitary one in *Dickins*, which decides that the suing out of the *elegit* is not necessary, as a preliminary step. With respect to authority, therefore, there can be no doubt; for there is not only the authority of Lord Redesdale, and that of Lord Lyndhurst, in the House of Lords, but there is also, what is stated at the bar to be the uniform understanding and practice of the profession. The conclusion at which I arrive, however, as to what, on principle, ought to be the rule, is derived from a consideration of the nature of the jurisdiction which the court exercises in such cases. That jurisdiction is not for the purpose of giving effect to the lien, which is supposed to be created by the judgment. It is true, that, for certain purposes, the court recognizes a title by the judgment; as for the purpose of redeeming, or after the death of the debtor, of having his assets administered. But the jurisdiction there is grounded simply upon this, that, inasmuch as the court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it does, what it does in all similar cases; it gives to the party the right to come in and redeem other incumbrances upon the property. So, again, after the debtor is dead, if, under any circumstances, the estate is to be sold, the court pays off the judgment creditor, because it cannot otherwise make a title to the estate; and the court never sells the interest of a debtor subject to an *elegit* creditor. That was very much discussed in the case of *Tunstall v. Trappes*. But there there was a

§ 1216 c. It is upon the same ground, that, where there is a specialty debt, binding the heirs, and the debtor dies, whereby a lien attaches upon all the lands descended in the hands of his heirs, courts of equity will interfere in aid of the creditor, and, in proper cases, accelerate the payment of the debt. At law the creditor can only take out execution against the whole lands, and hold them, as he would under an *elegit*, until the debt is fully paid.¹ But, in equity, the creditor will also be entitled to an account of the rents and profits received by the heir since the descent cast. And courts of equity will go further and decree a sale of the inheritance in order to accelerate the payment of the debt, if it cannot otherwise be satisfied within a reasonable period.² The same doctrine is applied to reversions after an estate for life, and even necessity for a sale; and the question was not as to the right of the judgment creditor against his debtor, he being willing; but, where, from other circumstances, a sale having become indispensable, it was necessary to clear the estate from the claims of parties, who had charges upon it. It is, therefore, not correct to say, that according to the usual acceptation of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right. What gives a judgment creditor a right against the estate, is only the act of Parliament; for, independently of that, he has none. The act of Parliament gives him, if he pleases, an option by the writ of *elegit*, — the very name implying, that it is an option, — which, if he exercises, he is entitled to have a writ directed to the sheriff, to put him in possession of a moiety of the lands. The effect of the proceeding under the writ is to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this court, not to obtain a greater benefit than the law, that is, the act of Parliament has given him, but to have the same benefit, by the process of this court, which he would have had at law, if no legal impediment had intervened. How, then, can there be a better right; or how can the judgment, which *per se*, gives the creditor no title against the land, be considered as giving him a title here? Suppose he never sues out the writ, and never, therefore, exercises his option, is this court to give him the benefit of a lien, to which he has never chosen to assert his right? The reasoning would seem very strong, that, as this court is lending its aid to the legal right (and Lord Redesdale expressly puts it under that head, namely, the right to recover in ejectment), the party must have previously armed himself with that, which constitutes his legal right; and that which constitutes the legal right is the writ. This court, in fact, is doing neither more nor less than giving him what the act of Parliament and an ejectment would, under other circumstances, have given him at law."

¹ Bac. Abridg. Heir and Ancestor, H. 1; 2 Tidd's Pract. (9th edit.) p. 936 to 938.

² Curtis v. Curtis, 2 Bro. Ch. R. 633, 634; Tyndale v. Warre, Jacob, R. 212; Ante, § 628, note. See Ante, § 1064 a.

after an estate tail; for they will be decreed to be sold to satisfy a bond debt of the ancestor, which binds the heir, in order to accelerate the payment of the debt.¹ And, indeed, courts of equity have, in the case of advowsons, gone further; and have decreed an advowson in gross to be sold to satisfy a bond creditor; holding such an advowson to be assets at law, even if not extendible on an *elegit*.²

§ 1217. But there are liens recognized in equity, whose existence is not known or obligation enforced at law, and in respect to which courts of equity exercise a very large and salutary jurisdiction.³ In regard to these liens, it may be generally stated, that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached, as a charge or incumbrance; and they can be enforced only in courts of equity.⁴ The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached.⁵ Of this we have a strong illustration in the well-known doctrine of courts of equity, that the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself, and his heirs, and other privies in estate, but also against all subsequent purchasers, having notice, that the purchase-money remains unpaid.⁶ To the extent of the

¹ *Tyndale v. Warre*, Jacob, R. 212.

² *Robinson v. Tonge*, 3 P. Will. 308, 401; *Kinaston v. Clark*, 2 Atk. 204, 206. There have been doubts, whether an advowson in gross was assets at law; but the weight of authority certainly is, that it is. See Lord Hardwicke's opinion in *Westfaling v. Westfaling*, 3 Atk. 464, 465; Co. Litt. 374 b, Com. Dig. Assets, 2 G. 1; *Robinson v. Tonge*, 3 P. Will. 401; S. C. 3 Bro. Parl. Cas. 556. Sir Thomas Plumer, however, in *Tyndale v. Warre* (Jacob, R. 221), held, that an advowson in gross was not assets at law; but still, if not, it was assets in equity. His words were: "It would seem, therefore, that the circumstances of its not being applicable to the payment of debts by a court of law, does not decide what is to be done here; as in the case of an advowson, which yields no present profit, and is not assets at law, and yet is decreed to be sold in equity."

³ *Gladstone v. Birley*, 2 Meriv. R. 403. See *Leeds v. Mer. Insur. Co.* 6 Wheat. R. 565.

⁴ See *Ante*, § 1047, 1058 to 1065.

⁵ *Neate v. Duke of Marlborough*, 3 Mylne & Craig, 407, 415; *Ante*, § 1216 b, note (1).

⁶ *Ante*, § 788, 789, 1216, note; 4 Kent, Comm. Lect. 58, p. 151 to 154 (3d ed.); *Burgess v. Wheate*, 1 W. Bl. 150; S. C. 1 Eden, R. 210; *Mackreth v. Symmons*, 15 Ves. 329, 337, 339, 342 to 350; *Garson v. Green*, 1 Johns. Ch. R. 308; *Hughes v. Kearney*, 1 Sch. & Lefr. 132; *Champion v. Brown*, 6 Johns. R. 402, 403; *Bayley v. Greenleaf*, 7 Wheaton, R. 46; *Daniels v. Davison*, 16 Ves. 249; S. C.

lien the vendee becomes a trustee for the vendor; and his heirs, and all other persons claiming under them with such notice, are treated as in the same predicament.¹

17 Ves. 433; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (e); 2 Madd. Ch. Pr. 105, 106; *McLearn v. McLellan*, 10 Peters, 625, 640. Sir Thomas Clarke (the Master of the Rolls) in *Burgess v. Wheate*, 1 W. Black. R. 150; S. C. 1 Eden, R. 211, said: "Where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was [is] paid prematurely, the money would be considered as a lien on the estate of the vendor for the personal representatives of the purchaser; which would leave things *in statu quo*. Mr. Sugden seems to have doubted whether this lien exists in favor of the vendee, who has paid the purchase-money. For alluding, as it should seem, to such a case he says, 'Where a lien is raised for purchase-money under the usual equity in favor of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But, in the case under consideration, equity must not simply give a security for an existing debt; it must first raise a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which, upon principle, it would be difficult to make him repay. What power has a court of equity to rescind a contract like this? The question might perhaps arise if the vendor was seeking relief in equity. But in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then, of course, he must retain the estate also, until some person appears who is by law entitled to require a conveyance of it.' Sugden on Vendors, ch. 5, p. 258 (7th edit.); Id. vol. 1, p. 284 (9th edit.). Lord Eldon cited the same position of Sir Thomas Clarke, in his very words, without objection or observation, in *Mackreth v. Symmons*, 15 Ves. 345. And afterwards, in the same case, p. 353, he used language importing an approval of it. 'This,' said he, 'comes very near the doctrine of Sir Thomas Clarke, which is very sensible, that, where the conveyance, or the payment, has been made by surprise (meaning, it is supposed, "prematurely," in the sense of Sir T. Clarke), there shall be a lien.' The ground, asserted by Mr. Sugden for his doubt, does not seem sufficient to sustain it. He assumes, that there is no debt between the parties, which is the very matter in controversy; for, in the view of a court of equity, the payment of the purchase-money may well be deemed a loan upon the security of the land, until it has been conveyed to the vendee. At least, there is quite as much reason to presume it, as there is to presume the land, when conveyed, to be still a security for the purchase-money due to the vendor. In the latter case, though there is a debt due by the vendee, it does not follow that it is a debt due by the land. In the former, if the estate cannot be conveyed and is not conveyed, the money is really a debt due to the vendee. At all events, in equity it is not very clear what principle is impugned, by deeming the money a lien upon the ground of presumed intention. See also *Oxenham v. Esdaile*, 3 Y. & Jerv. 264; *Ludlow v. Grayall*, 11 Price, R. 58. In *Finch v. Earl of Winchelsea*, 1 P. Will. 278, 282, Lord Chancellor Cowper said: 'Articles made for a valuable consideration and the money paid, will, in equity, bind the estate and prevail against any judgment creditor, mesne between the articles and the conveyance.'

¹ 4 Kent, Comm. Lect. 58, p. 152 (3d edit.); *McLearn v. McLellan*, 10 Peters, R. 625, 640.

§ 1218. This lien of the vendor of real estate for the purchase-money is wholly independent of any possession on his part; and it attaches to the estate, as a trust, equally, whether it be actually conveyed, or only be contracted to be conveyed.¹ It has often been objected, that the creation of such a trust by courts of equity is in contravention of the policy of the statute of frauds.² But, whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts.³ Courts of equity have proceeded upon the ground, that the trust, being raised by implication, is not within the purview of that statute; but is excepted from it. It is not, perhaps, so strong a case as that of a mortgage implied by a deposit of the title deeds of real estate, which seems directly against the policy of the statute, but which, nevertheless, has been unhesitatingly sustained.⁴

§ 1219. The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration-money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment; for it attaches to him, also, as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a predicament, better than his own, with full notice of all the facts.⁵

§ 1220. It has been sometimes suggested, that the origin of this lien of the vendor might be attributed to the tacit consent or implied agreement of the parties. But, although in some cases it may be perfectly reasonable to presume such a consent or agreement, the lien is not, strictly speaking, attributable to it, but stands independently of any such supposed agreement.⁶ On other occasions the lien has been treated as a natural equity, having its foun-

¹ Sugden on Vendors, ch. 12, p. 541 (7th edit.); *Smith v. Hubbard*, 2 Dick. R. 730; *McLearn v. McLellan*, 10 Peters, R. 625, 640; *Dodsley v. Varley*, 12 Adolph. & Ellis, 632, 633; *Ante*, § 1216, and note.

² Stat. 29 Charles II. 3.

³ Coote on Mortg. 227; *Mackreth v. Symmons*, 15 Ves. 339.

⁴ *Ante*, § 1020; *Post*, § 1230. [* See also *Dudley v. Dickson*, 1 McCarter, 252.]

⁵ See *Mackreth v. Symmons*, 15 Ves. R. 340, 347, 349.

⁶ *Nairn v. Prowse*, 6 Ves. 752; *Chapman v. Tanner*, 1 Vern. R. 267.

dation in the earliest principles of courts of equity.¹ Thus, it has been broadly contended, that, according to the law of all nations, the absolute dominion over property sold is not acquired by the purchaser until he has paid the price, or has otherwise satisfied it, unless the vendor has agreed to trust to the personal credit of the buyer.² For a thing may well be deemed to be unconscientiously obtained, when the consideration is not paid.³ Upon this ground the Roman law declared the lien to be founded in natural justice. *Tamen rectè dicitur, et jure gentium, id est, jure naturali, id effici.*⁴ And, therefore, when courts of equity established the lien, as a matter of doctrine, it had the effect of a contract, and the lien was held to prevail, although, perhaps, no actual contract had taken place.⁵

§ 1221. The true origin of the doctrine may, with high probability, be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England.⁶ By the Roman law, the vendor of property sold had a privilege, or right of priority of payment, in the nature of a lien on the property, for the price for which it was sold, not only against the vendee and his representatives, but against his creditors, and also against subsequent purchasers from him. For it was a rule of that law, that, although the sale passed the title and dominion in the thing sold; yet it also implied a condition, that the vendee should not be master of the thing so sold, unless he had paid the price, or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction. *Quod vendidi* (said the Di-

¹ *Chapman v. Tanner*, 1 Vern. R. 267, 268; *Blackburne v. Gregson*, 1 Bro. Ch. R. 424; 1 Fonbl. Eq. B. 1, ch. 5, § 8.

² By Mr. Scott and Mr. Mitford, in argument, in *Blackburne v. Gregson*, 1 Cox, R. 94.

³ *Hughes v. Kearney*, 1 Sch. & Lefr. 135. It was formerly doubted, in consequence of an expression which fell from Lord Hardwicke, in *Pollexfen v. Moore* (3 Atk. R. 273), whether this lien of the vendor could exist in favor of a third person; as, for example, if the vendor, having such a lien, should exhaust the personal estate of the deceased purchaser, whether legatees should have a right to stand in his place against the real estate in the hands of the heir, as upon the marshalling of the assets. That doubt is now removed, and the affirmative established in *Selby v. Selby*, 4 Russell, R. 336. See also Lord Eldon's remarks in *Mackreth v. Symmons*, 15 Ves. 338, 344, and Sir Wm. Grant's decision in *Trimmer v. Bayne*, 9 Ves. 209; and Sugden on Vendors, ch. 12, p. 549 to 556 (7th edit.); *Id.* vol. 2, p. 73 to 76 (9th edit.).

* Inst. Lib. 2, tit. 1, § 41.

⁶ *Mackreth v. Symmons*, 15 Ves. 337.

⁶ *Ibid.* 15 Ves. 344.

gest), *non aliter fit accipientis quam si aut pretium nobis solutum sit aut satis eo nomine factum; vel etiam fidem habuerimus emptori sine ullâ satisfactione.*¹ *Ut res emptoris fiat, nihil interest, utrum solutum sit pretium, an eo nomine fidejussor datus sit.*² The doctrine was still more explicitly laid down in the Institutes. *Venditiæ vero res, et traditiæ, non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit; veluti expromissore aut pignore dato. Sed, si is, qui vendidit, fidem emptoris sequutus fuerit, dicendum est, statim rem emptoris fieri.*³ The rule was equally applied to the sale of movable and of immovable property; and equally applied, whether there had been a delivery of possession to the vendee or not. If there was no such delivery of possession, then the vendor might retain the property as a pledge, until the price was paid. If there was such a delivery of possession, then the vendor might follow the property into the hands of any person, to whom it had been subsequently passed, and reclaim it or the price.⁴ *Venditor enim, quasi pignus, retinere potest eam rem, quam vendidit.*⁵ And a part payment of the price did not exonerate the property from the privilege or lien for the residue. *Hæreditatis venditiæ pretium pro parte accepit, (said the Digest, quoting Scævola,) reliquum emptore non solvente; quæsitum est, an corpora hæreditaria pignoris nomine teneantur? Respondi; nihil proponi, cur non teneantur.*⁶

§ 1222. This close analogy, if not this absolute identity, of the English doctrine of the lien of the vendor with that of the Roman law of privilege on the same subject, seems to demonstrate a common origin; although in England the lien is ordinarily confined to cases of the sale of immovables, and it does not extend to movables, where there has been a transfer of possession.⁷ There are,

¹ Dig. Lib. 18, tit. 1, l. 19; Pothier, Pand. Lib. 41, tit. 1, n. 60.

² Dig. Lib. 18, tit. 1, l. 53; Pothier, Pand. Lib. 41, tit. 1, n. 60.

³ Inst. Lib. 2, tit. 1, § 41; and Vinn. Comm. h. tit.

⁴ 1 Domat, B. 3, tit. 1, § 5, art. 4; Inst. Lib. 2, tit. 1, § 41. The same rule exists in the French law in regard to immovables. But in regard to movables, when delivered to the vendee, there is no sequel (as it is phrased in the French law) by way of privilege or lien against the property, except while it remains in the hands of the purchaser. If he has sold it, the right of privilege or lien for the price is gone. 1 Domat, B. 3, tit. 1, § 5, art. 4, and note.

⁵ Id. Dig. Lib. 19, tit. 1, l. 13, § 8; Pothier, Pand. Lib. 41, tit. 1, n. 60, 61; Id. Lib. 19, tit. 1, n. 5.

⁶ Domat, B. 3, tit. 1, § 5, art. 4; Dig. Lib. 18, tit. 4, l. 22; Pothier, Pand. Lib. 19, tit. 1, n. 5.

⁷ See *Blackburne v. Gregson*, 1 Cox, R. 100; *arguendo*, *Mackreth v. Symmons*,

however, some exceptions from the doctrine in each law, founded upon the same general principle, but admitting of some diversity in respect to its practical application.

§ 1223. We have seen that the lien by the Roman law ceased (1.) where the price was actually paid; (2.) where anything was taken in satisfaction of the price, although payment had not been positively made; (3.) where a personal credit was given to the vendee, excluding any notion of a lien; *Aut pretium nobis solutum sit* (said the Digest); *aut satis eo nomine factum; vel etiam fidem habuerimus emptori sine ullâ satisfactione*.¹ Pothier has deduced the conclusion, that, in the civil law, the question, whether a personal credit was given to the vendee, or not, was to be judged of by all the circumstances of the case. Whenever it was doubtful whether such credit was given or not, there it was not to be presumed, unless made certain by the vendee.² In every other case, either a payment or a satisfaction of the price was necessary to discharge the property. The giving of a pledge or security for the price was deemed equivalent to payment. *Qualibet ratione, si venditori de pretio satisfactum est, veluti, expromissore aut pignore dato, proinde sit, ac si pretium solutum esset*.³

§ 1224. Now, the same principle is applied in English jurispru-

15 Ves. 344. See *Haggerty v. Palmer*, 6 Johns. Ch. R. 437; *Cowell v. Simpson*, 16 Ves. 278, 280, 281.

¹ Dig. Lib. 18, tit. 1, l. 19; Inst. Lib. 2, tit. 1, § 41. Vinnius distinguishes between a payment and a satisfaction. *Satisfaciendi verbum generalius est, quam solvendi. Qui solvit, utique et satisfacit; at non omnis satisfactio solutio est. Satisfacit, et qui non liberatur; veluti, si quis fidejussorem vel pignora det; solutione vero obligatio tollitur.* Vinnius also says, that a personal credit, given to the vendor, without satisfaction, is a waiver of the lien. For, commenting on the words of the Institute, *Sed si is, qui vendidit, fidem emptoris sequutus fuerit*, he says: *Id est, fidem emptori de pretio habuerit sine ullâ satisfactione.* What will amount to such personal credit, he adds, depends on circumstances, but an agreement for postponement of payment to a future day would be such a personal credit, and would discharge the lien. *Quod ex circumstantiis æstimandum; veluti, si dies, solutioni dicta sit.* And for this he cites the Code. (Cod. Lib. 4, tit. 54, l. 3.) He then proceeds: *Aut si, cum emptor pecuniam ad manum non haberit, venditor dixerit; I, licet; nunc non requiro; postea dabis.* Vinn. ad Inst. Lib. 2, tit. 1, § 41, Comm. (2).

² Pothier, Pand. Lib. 41, tit. 1, note 60. In this position Vinnius agrees with Pothier, contrary to what is held by some other jurists. *In dubio, qui rem emptori tradit, non videtur sequi fidem emptoris, nisi emptor contrarium doceat.* Vinn. ad Inst. Lib. 2, tit. 1, § 41; Comm. (3).

³ Dig. Lib. 18, tit. 1, l. 53; Pothier, Pand. Lib. 41, tit. 1, n. 60; Inst. Lib. 2, tit. 1, § 41.

dence.¹ Generally speaking, the lien of the vendor exists; and the burden of proof is on the purchaser to establish, that, in the particular case, it has been intentionally displaced, or waived by the consent of the parties.² If, under all the circumstances, it remains in doubt, then the lien attaches. The difficulty lies in determining what circumstances are to be deemed sufficient to repel or displace the lien, or to amount to a waiver of it. And, upon the authorities, this is left in such a state of embarrassment, that a learned judge has not hesitated to say, that it would have been better at once to have held, that the lien should exist in no case, and that the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not exist.³ At present, that certainty cannot be generally affirmed.

§ 1225. If, upon the face of the conveyance, the consideration is expressed to be paid, and even if a receipt therefor is indorsed upon the back of it, and yet, in point of fact, the purchase-money has not been paid, the lien is not gone; but it attaches against the vendee and all persons claiming as volunteers, or with notice under him.⁴ [And knowledge on the part of the vendee that some portion of the purchase-money is unpaid, without knowing how much, or how it is secured, is sufficient to put a subsequent purchaser upon inquiry.⁵]

§ 1226. The taking of a security for the payment of the purchase-money, is not, of itself, as it was in the Roman law, a posi-

¹ In some American States the existence of such a lien is denied. See *Philbrook v. Delano*, 29 Maine, 410.

² *Mackreth v. Symmons*, 15 Ves. 342, 344, 348, 349; *Hughes v. Kearney*, 1 Sch. & Lefr. 135, 136; *Nairn v. Prowse*, 6 Ves. 752; *Garson v. Green*, 1 Johns. Ch. R. 308, 309; *Sugden on Vendors*, ch. 12, p. 541 to 560 (7th edit.); *Id.* vol. 2, ch. 12, p. 57 to 76 (9th edit.).

³ *Lord Eldon*, in *Mackreth v. Symmons*, 15 Ves. 340.

⁴ *Ibid.* 15 Ves. 337, 339, 340, 350; *Hughes v. Kearney*, 1 Sch. & Lefr. 135, 136; *Winter v. Anson*, 3 Russ. 488; S. C. 1 Sim. & Stu. 434; *Saunders v. Leslie*, 2 B. & Beatt. 514, 515; *Sugden on Vendors*, ch. 12, p. 541 to 557 (7th edit.); *Id.* vol. 2, ch. 12, p. 57 to 76 (9th edit.). *Lord Redesdale*, in *Hughes v. Kearney*, 1 Sch. & Lefr. 135, said: "If a person, claiming as a purchaser, admitted, that the consideration was not paid, this would be taken *primâ facie* as a fraud; and it would lie on him to show that it was not a fraud."

⁵ *Manly v. Slason*, 21 Verm. 271.

tive waiver or extinguishment of the lien.¹ It is, perhaps, to be regretted, that it has not been so held; as, when a rule so plain is once communicated, if the vendor should not take an adequate security, he would lose his lien by his own fault.² But the taking a security has been deemed, at most, as no more than a presumption, under some circumstances, of an intentional waiver of the lien; and not as conclusive of the waiver.³ And if a security is taken for the money, the burden of the proof has been adjudged to lie on the vendee to show, that the vendor agreed to rest on that security, and to discharge the land.⁴ Nay, even the taking of a distinct and independent security, as, for instance, of a mortgage on another estate, or of a pledge of other property has been deemed not to be conclusive evidence that the lien is waived.⁵ The taking of bills of ex-

¹ *Mackreth v. Symmons*, 15 Ves. 342, 344, 347 to 349; *Nairn v. Prowse*, 6 Ves. 759, 760; *Garson v. Green*, 1 Johns. Ch. R. 308; 4 Kent, Comm. Lect. 58, p. 152, 153 (3d edit.); *Lewis v. Caperton*, 8 Gratt. 148; *Plowman v. Riddle*, 14 Ala. 169. This subject was very fully examined by Lord Eldon, in his elaborate judgment in *Mackreth v. Symmons*, 15 Ves. 330, 336, 342. In one part of that judgment he used the following language: "If I had found it laid down, in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien, that would be satisfactory; as, when a rule so plain is once communicated, the vendor, not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to me, that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expressions used upon other occasions) of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious, that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain upon that point. That observation is justified by a review of the authorities; from which it is clear, that different judges would have determined the case differently. And if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right." It is greatly to be regretted, that the English jurisprudence, instead of dealing in nice distinctions, had not followed out the plain and convenient rule of the civil law, that the taking of any security, or giving any credit, was an extinguishment of the lien.

² *Ibid.*

³ *Ibid.*

⁴ *Hughes v. Kearney*, 1 Sch. & Lefr. 135, 136; *Saunders v. Leslie*, 2 B. & Beatt. R. 514, 515. But see *Bradford v. Marvin*, 2 Florida, 463.

⁵ *Ibid.*; *Saunders v. Leslie*, 1 Ball & Beatt. R. 514, 515. In *Nairn v. Prowse* Eq. JUR. — VOL. II.

change,¹ drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver

(6 Ves. 752), where the question was, whether the taking of a special security, by way of pledge, was a waiver of the lien, Sir William Grant (Master of the Rolls) held that it was. Upon that occasion, he said: "Upon the question, as to the claim set up by Mitchell to a lien, it is now settled, that equity gives the vendor a lien for the price of the estate sold, without any special agreement. But, supposing he does not trust to that, but carves out a security for himself, it still remains matter of doubt, and has not received any positive decision, whether that does or does not amount to a waiver of the equitable lien; so as to preclude the vendor from resorting back to that lien, the security proving insufficient. Without entering into that question, whether every security necessarily amounts to a waiver, it is impossible to contend, that there may not be a security that will have that effect, that will be a waiver. By conveying the estate without obtaining payment, a degree of credit is necessarily given to the vendee. That credit may be given upon the confidence of the existence of such a lien. The knowledge of that may be the motive for permitting the estate to pass without payment. Then, it may be argued, that, taking a note or a bond, cannot materially vary the case. A credit is still given to him; and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the conveyance. But, if the conveyance be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien? Suppose a mortgage was made upon another estate of the vendee; will equity at the same time give him what is in effect a mortgage upon the estate he sold; the obvious intention of burdening one estate being, that the other shall remain free and unincumbered? Though in that case the vendor would be a creditor, if the mortgage proved deficient; yet he would not be a creditor by lien upon the estate he had conveyed away. The same rule must hold with regard to any other pledge for the purchase-money. In this case, the vendor trusts to no personal security of the vendee, but gets possession of a long annuity of £ 100 a year; which, according to the rise or fall of stock, might or might not be sufficient for the purchase-money. He has, therefore, an absolute security in his hands, not the personal security of the vendee. Could the vendee have any motive for parting with his stock, but to have the absolute dominion over the land? It is impossible it could be intended, that he should have this double security, an equitable mortgage and a pledge; which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money." Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. 348, in commenting on this case, said: "The Master of the Rolls, in his judgment, admitting the general doctrine, as to the vendor's lien, observes upon the question, whether a security taken will be a waiver, that, by conveying the estate without payment, a degree of credit is given to the vendee, which may be given upon the confidence of the existence of such lien. And it may be argued, that taking a note or a bond cannot materially vary the case; a credit is still given to him; and

¹ But see *Way v. Patty*, 1 Carter, 102; *Sears v. Smith*, 2 Mich. 243; *Trustees v. Wright*, 11 Illinois, 603.

of the lien, but to be merely a mode of payment.¹ And it has been laid down as clear doctrine, that, in general, where a bill, note, or bond is given for the whole or a part of the purchase-money, the vendor does not lose his lien for so much of the purchase-money as remains unpaid, even though it is secured to be paid at a future day, or not until after the death of the purchaser.² [And it has been

may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt, indorsed upon the conveyance. There is great difficulty to conceive how it should have been reasoned almost in any case, that the circumstance of taking a security was evidence that the lien was given up; as, in most cases, there is a contract under seal for payment of the money. The Master of the Rolls, having before observed that there may be a security which will have the effect of a waiver, proceeds to express his opinion, that, if the security be totally distinct and independent, it will then become a case of substitution for the lien, instead of a credit given on account of the lien; meaning, that, not a security, but the nature of the security may amount to satisfactory evidence that a lien was not intended to be reserved. And [he] puts the case of the mortgage of another estate, or any other pledge, as evidence of an intention, that the estate sold shall remain free and unincumbered. It must not, however, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended; as I could put many instances, that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien; although, in the ordinary case, a man has always greater security for his money upon a mortgage, than value for his money upon a purchase. And the question must be, Whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow, that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore gives up the lien which he has? Under all the circumstances of that case, the judgment of the Master of the Rolls was satisfied that the conclusion did follow. But the doctrine, as to taking a mortgage, or a pledge, would be carried too far, if it is understood, as applicable to all cases, that a man, taking one pledge, therefore necessarily gives up another; which must, I think, be laid down upon the circumstances of each case, rather than universally."

¹ *Hughes v. Kearney*, 1 Sch. & Lefr. 135, 136; *Gibbons v. Baddall*, 2 Eq. Abr. 682, note; *Grant v. Mills*, 2 Ves. & B. 306; *Cooper v. Spottiswoode*, Tamlyne, R. 21; *Ex parte Peake*, 1, Madd. R. 349; *Ex parte Loring*, 2 Rose, R. 79; *Saunders v. Leslie*, 2 B. & Beatt. 514; *Sugden on Vendors*, ch. 12, p. 544 to 549, (7th edit.); *Id.* vol. 2, ch. 12, p. 57 to 67 (9th edit.).

² *Winter v. Lord Anson*, 3 Russ. R. 488, 490, overruling the Vice-Chancellor's decision; *S. C.* 1 Sim. & Stu. 434; *Manly v. Slason*, 21 Verm. 271. See *Fawell v. Heelis*, Ambler, R. 724, and *Mr. Blunt's note*; *Frail v. Ellis*, 17 Eng. Law & Eq. R. 457; *Buckland v. Pocknell*, 13 Sim. 406; *Blair v. Bromley*, 5 Hare, 542; 2 Phillips, 354; *Hewitt v. Loosemore*, 9 Hare, 449; *Kyles v. Tait*, 6 Gratt. 44. — How far the taking of an independent and distinct security from a third person

said that in order to have a special contract between the parties in reference to the purchase-money operate as a waiver of the lien, the contract must be inconsistent with the existence of the lien.^{1]}

would affect the lien, has not, perhaps, been absolutely decided in England. *Grant v. Mills*, 2 Ves. & Beam. 306, 309. Indeed, the whole doctrine, respecting the effect of taking a security, is established in England, upon grounds not very satisfactory under any circumstances. See *Ex parte Loring*, 2 Rose, Cas. 80. In the case of *Gilman v. Brown*, 1 Mason, R. 212, the whole doctrine was reviewed at large; and a different conclusion was arrived at from that stated in the text. The following extract may not be wholly unacceptable, as presenting the reasoning opposed to that maintained in some of the late English authorities: "The doctrine, that a lien exists on the land for the purchase-money, which lies at the foundation of the decision of the commissioners, as well as of the present defence, deserves a very deliberate consideration. It can hardly be doubted, that this doctrine was borrowed from the text of the civil law; and although it may now be considered as settled, as between the vendor and vendee, and all claiming under the latter, with notice of the non-payment of the purchase-money; yet its complete establishment may be referred to a comparatively recent period. Lord Eldon has given us an historical review of all the cases (*Mackreth v. Symmons*, 15 Ves. 329), from which he deduces the following inferences. First, That generally speaking, there is such a lien. Secondly, That in those general cases, in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a third person, who had notice that the money was not paid. These two points, he adds, seem to be clearly settled; and the same conclusion has been adopted by a very learned chancellor of our own country. *Garson v. Green*, 1 Johns. Ch. R. 308. The rule, however, is manifestly founded on a supposed conformity with the intention of the parties, upon which the law raises an implied contract; and therefore, it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion. What circumstances shall have such an effect seems, indeed, to be a matter of a good deal of delicacy and difficulty. And the difficulty is by no means lessened by the subtle doubts and distinctions of recent authorities. It seems, indeed, to be established, that, *primâ facie*, the purchase-money is a lien on the land; and it lies on the purchaser to show, that the vendor agreed to waive it (*Hughes v. Kearney*, 1 Sch. & Lefr. 132; *Mackreth v. Symmons*, 15 Ves. 329; *Garson v. Green*, 1 Johns. Ch. Rep. 308); and a receipt for the purchase-money, indorsed upon the conveyance, is not sufficient to repel this presumption of law. But how far the taking a distinct security for the purchase-money shall be held to be a waiver of the implied lien, has been a vexed question. There is a pretty strong, if not decisive current of authority, to lead us to the conclusion, that merely taking the bond, note, or covenant of the vendee himself, for the purchase-money, will not repel the lien; for it may be taken to countervail the receipt of the payment usually indorsed on the conveyance. *Hughes v. Kearney*, 1 Sch. & Lefr. 132; *Nairn v. Prowse*, 6 Ves. 752; *Mackreth v. Symmons*, 15 Ves. 329; *Blackburne v. Gregson*, 1 Bro. Ch. Cas. 420; *Garson v. Green*, 1 Johns. Ch. R. 308; *Gibbons v. Baddall*, 2 Eq. Cas.

¹ *Manly v. Slason*, 21 Verm. 271; *Hallock v. Smith*, 3 Barbour, 267.

§ 1227. The lien of the vendor is not confined to himself alone ; but, in case of his death, it extends to his personal representatives.¹

Abr. 682, note ; *Coppin v. Coppin*, 2 P. Will. 291 ; cases cited in Sugden on Vendors, ch. 12, p. 541 (7th edit.), &c. But, where a distinct and independent security is taken, either of other property, or of the responsibility of third persons, it certainly admits of a very different consideration. There, the rule may properly apply, that *expressum facit cessare tacitum* ; and where the party has carved out his own security, the law will not create another in aid. This was manifestly the opinion of Sir William Grant, in a recent case, where he asks : ‘ If the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien ? ’ And he then puts the case of a mortgage on another estate for the purchase-money, which he holds to be a discharge of the lien, and asserts that the same rule must hold with regard to any other pledge for the purchase-money. (*Nairn v. Prowse*, 6 Ves. 752.) And the same doctrine was asserted in a very early case, where a mortgage was taken for a part only of the purchase-money, and a note for the residue. *Bond v. Kent*, 2 Vern. 281. [See also *Follett v. Reese*, 2 Ohio, 546 ; *McClure v. Harris*, 12 B. Monroe, 261 ; *Vail v. Foster*, 4 Comst. 312 ; *Young v. Wood*, 11 B. Monroe, 123 ; *Bradford v. Marvin*, 2 Florida, 463 ; *Johnson v. Sugg*, 13 Sm. & Mar. 346.] Lord Eldon, with his characteristic inclination to doubt, has hesitated upon the extent of this doctrine. He seems to consider, that whether the taking of a distinct security will have the effect of waiving the implied lien, or not, depends altogether upon the circumstances of each case, and that no rule can be laid down universally ; and that, therefore, it is impossible for any purchaser to know, without the judgment of a court, in what cases a lien would, and in what cases it would not exist. His language is, ‘ If, on the other hand, a rule has prevailed (as it seems to me) that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expression used on other occasions) of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual ; it is obvious, that the purchaser taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain upon that point.’ *Mackreth v. Symmons*, 15 Ves. 329, 342 ; *Austin v. Halsey*, 6 Ves. Jr. 475. If, indeed, this be the state of the law upon this subject, it is reduced to a most distressing uncertainty. But, on a careful examination of all the authorities, I do not find a single case, in which it has been held, if the vendor takes a personal collateral security, binding others, as well as the vendee, as, for instance, a bond or note, with a surety or an indorser, or a collateral security by way of pledge or mortgage, that, under such circumstances, a lien exists on the land itself. The only case, that looks that way, is *Elliot v. Edwards*, 3 Bos. & Pull. 181, where, as Lord Eldon says, the point was not decided. And it was certainly a case depending upon its own peculiar circumstances, where the surety himself might seem to have stipulated for the lien, by requiring a covenant against an as-

¹ *Ante*, § 788 to 791, 1216, 1217.

It may also be enforced in favor of a third person, notwithstanding the doubts formerly expressed by Lord Hardwicke.¹ As, for ex-

signment of the premises, without the joint consent of himself and the vendor. Lord Redesdale, too, has thrown out an intimation (*Hughes v. Kearney*, 1 Sch. & Lefr. 132), that it must appear that the vendor relied on it as security; and he puts the case: 'Suppose bills given, as part of the purchase-money, and suppose them drawn on an insolvent house, shall the acceptance of such bills discharge the vendor's lien? They are taken, not as a security, but as a mode of payment.' In my humble judgment, this is begging the whole question. If, upon the contract of purchase, the money is to be paid in cash, and bills of exchange are afterwards taken in payment, which turn out unproductive, there, the receipt of the bills may be considered as a mere mode of payment. But if the original contract is, that the purchase-money shall be paid at a future day, and acceptances of third persons are to be taken for it, payable at such future day, or a bond with surety payable at such future day, I do not perceive how it is possible to assert, that the acceptances or bond are not relied on as security. It is sufficient, however, that the case was not then before his lordship; and that he admits, that taking a distinct security would be a waiver of the lien. On the other hand, there are several cases, in which it is laid down, that, if other security be taken, the implied lien on the land is gone. To this effect, certainly, the case of *Fawell v. Heelis*, Ambler, R. 724; S. C. 2 Dick. R. 485, is an authority, however it may, on its own circumstances, have been shaken. And the doctrine is explicitly asserted and acted upon in *Nairn v. Prowse*, 6 Ves. Jr. 752. See also *Bond v. Kent*, 2 Vern. 281. In our own country, a very venerable judge of equity has recognized the same doctrine. He says: 'The doctrine, that the vendor of land not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost.' *Cole v. Scott*, 2 Wash. R. 141. Looking to the principle upon which the original doctrine of lien is established, I have no hesitation to declare, that, taking the security of a third person for the purchase-money, ought to be held a complete waiver of any lien upon the land; and that, in a case standing upon such a fact, it would be very difficult to bring my mind to a different conclusion. At all events, it is *primâ facie* evidence of a waiver; and the onus is on the vendor to prove, by the most cogent and irresistible circumstances, that it ought not to have that effect. Such was the result of my judgment upon an examination of the authorities, when a very recent case before the Master of the Rolls first came to my knowledge. I have perused it with great attention, and it has not, in any degree, shaken my opinion. The case there was of acceptances of the vendee and of his partner in trade, taken for the payment of the purchase-money. It was admitted, that there was no case of a security given by a third person in which the lien had been held to exist. But the Master of the Rolls, without deciding what would be the effect of a security, properly so denominated, of a third person, held, in conformity to

¹ *Pollexfen v. Moore*, 3 Atk. 273; *Ante*, § 1220, note.

ample, it may be enforced by marshalling assets in favor of legatees and creditors, and giving them the benefit, by the way of sub-

the opinion of Lord Redesdale, that bills of exchange were merely a mode of payment, and not a security. This conclusion he drew from the nature of such bills, considering them as mere orders on the acceptor, to pay money of the drawer to the payee; and that the acceptor was to be considered, not as a surety for the debt of another, but as paying the debt out of the debtor's funds in his hands. *Grant v. Mills*, 2 Ves. & Beam. R. 309. With this conclusion of the Master of the Rolls, I confess myself not satisfied, and desire to reserve myself for the case, when it shall arise in judgment. It is founded on very artificial reasoning, and not always supported in point of fact by the practice of the commercial world. The distinction, however, on which it proceeds, admits, by a very strong implication, that the security of a third person would repel the lien. If, indeed, the point were new, there would be much reason to contend, that a distinct security of the party himself would extinguish the lien on the land, as it certainly does the lien upon personal chattels. *Cowell v. Simpson*, 16 Ves. Jr. 275. In applying the doctrine to the facts of the present case, I confess that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase-money. The property was a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was, in the necessary contemplation of all parties, bought on speculation, to be sold out to sub-purchasers, and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might, by a subdivision of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable, that so obvious a consideration should not have been within view of the parties; and, viewing it, it is very difficult to suppose, that they could mean to create such an incumbrance. A distinct and independent security was taken by negotiable notes, payable at a future day. There is no pretence, that the notes were a mere mode of payment, for the indorsers were, by the theory of the law, and in fact, conditional sureties for the payment. And in this respect, the case is distinguishable from that of receiving bills of exchange, where, by the theory of the law, the acceptor is not a surety, but merely pays the money of the drawer in pursuance of his order. *Hughes v. Kearney*, 1 Sch. & Lefr. 132; *Grant v. Mills*, 2 Ves. & Beam. R. 309. The securities themselves were, from their negotiable nature, capable of being turned immediately into cash; and, in their transfer from hand to hand, they could never have been supposed to draw after them, in favor of the holder, a lien on the land for their payment. But I pass over these and some other peculiar circumstances of this case, and put it upon the broad and general doctrine, that here was the security of a third person, taken as such, and that extinguished any implied lien for the purchase-money." See also *Brown v. Gilman*, 4 Wheat. R. 290 to 292; *Fish v. Howland*, 1 Paige, R. 20; *Stafford v. Van Rensselaer*, 9 Cowen, R. 316; *Cox v. Fenwick*, 3 Bibb, 183; *Johnson v. Sugg*, 13 S. & M. 346; Mr. Chancellor Kent, in his Commentaries (4 Kent, Comm. Lect. 58, p. 151 to 153, 3d edit.), has summed up the general doctrine, as well as the exceptions to it, with great clearness and accuracy. He holds that the better opinion is, that,

stitution to the vendor, when he seeks payment out of the personal assets of the vendee.¹ So, if a subsequent incumbrancer, or purchaser from the vendee, is compelled to discharge the lien of the vendor, he will in like manner be entitled to stand substituted in his place against other claimants under the vendor on the estate, and to have the assets marshalled in his favor.² [But if notes are given for the purchase-money, and these are assigned by the vendor, the assignee acquires no lien for their payment on the land sold.³]

§ 1228. This lien does not exist against purchasers under a conveyance of the legal estate made *bonâ fide*, for a valuable consider-

taking a note, bond, or covenant of the vendee himself is not a waiver of the lien; for such instruments are only the ordinary evidence of a debt. But that taking a note, bill, or bond, with a distinct security, or taking a distinct security, exclusively by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the vendor does not repose upon the lien, but upon an independent security, and it discharges the lien. This conclusion he deduces from a survey of the American, as well as the English authorities. See, also, 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (e); Id. B. 1, ch. 5, § 8, note (l).

¹ *Ante*, § 1220, note (2); Selby v. Selby, 4 Russ. R. 336; Mackreth v. Symmons, 15 Ves. 339, and note (a); Id. 345.

² *Manlove v. Bale*, 2 Vern. 84. It was decided in *Clarke v. Royle* (3 Sim. R. 499), that, where A. conveyed an estate to B., and in consideration thereof B. covenanted with A. to pay an annuity to him of £ 60, for life, and £ 3,000 to other persons, in the event of his (B.'s) marrying, the covenant did not create a lien on the estate in favor of the persons entitled to the £ 3,000. See, also, *Foster v. Blackstone*, 1 Mylne & K. 296, 310; [* *Trevillian v. Mayor of Exeter*, 5 De G. M. & G. 828. But the debtor who removes an incumbrance cannot set it up against a subsequent incumbrance created by himself on the same property. *Otter v. Lord Vaux*, 6 Id. 638. Where two or more successive mortgagees advance money upon security of real property, without notice of a prior trust, fraudulently concealed by the mortgagor, the last mortgagee is at liberty, pending a suit by the *cestuis que trust* for redemption of the first mortgage, to pay off all prior mortgages, and, upon getting in the legal estate, to hold it until the moneys advanced by him have been paid in full. *Bates v. Johnson*, Johnson's R. 304. And where the mortgagee has been put to expense in defending the *title to the estate*, he is entitled to charge such expense against the estate; but if the costs accrue in defending his title under the mortgage only, the owners of the equity of redemption are not chargeable with the expense, unless they have participated in the litigation. *Parker v. Watkins*, Johnson, 133. As to the order of successive burdens upon real estate, see also *Stringer v. Harper*, 26 Beavan, 33; *Townshend v. Mestyn*, Id. 72; *Greated v. Greated*, Id. 621.]

³ *Weelborn v. Williams*, 8 Geo. 258; *Green v. Demoss*, 10 Humph. 371; *Dixon v. Dixon*, 1 Md. Ch. Dec. 220.

ation without notice, if they have paid the purchase-money; ¹ [nor against such purchaser from a fraudulent purchaser.²] The lien will also prevail against assignees claiming by a general assignment under the bankrupt and insolvent laws; ³ and against assignees claiming under a general assignment, made by a failing debtor for the benefit of creditors; for in such cases the assignees are deemed to possess the same equities only as the debtor himself would possess.⁴ So, it will prevail against [the claim of dower by the wife of the purchaser,⁵ and against] a judgment creditor of the vendee before an actual conveyance of the estate has been made to him; ⁶ and as it should seem, also against such a judgment creditor after the conveyance; for each party, as a creditor, would have a lien on the estate sold, with an equal equity, and, in that case, the maxim applies, *Qui prior est in tempore, potior est in jure*.⁷

§ 1229. But there is a clear distinction between the case of such a general assignment to assignees for the benefit of creditors generally, and a particular assignment to specified creditors for their particular security or satisfaction. The former are deemed to take as mere volunteers, and not as purchasers for a valuable consideration, strictly so called.⁸ The latter, if a conveyance of the property has been actually made, and they have no notice of the pur-

¹ *Ante*, § 788, 789; Sugden on Vendors, ch. 12, § 3, p. 557 (7th edit.); 2 Madd. Ch. Pr. 105, 106; Cator v. Bolingbroke, 1 Bro. Ch. R. 302; Mackreth v. Symmons, 15 Ves. 336, 339 to 341, 347, 353, 354; Champion v. Brown, 6 Johns. Ch. R. 402, 403.

² Boon v. Barnes, 23 Miss. 136.

³ Blackburne v. Gregson, 1 Bro. Ch. R. 420, by Belt; Sugden on Vendors, ch. 12, § 3, p. 557 (7th edit.); Mitford v. Mitford, 9 Ves. 100; Grant v. Mills, 2 Ves. & Beam. 306; Chapman v. Tanner, 1 Vern. 267; *Ex parte* Peake, 1 Madd. R. 356.

⁴ Fawell v. Heelis, Ambler, R. 726; Sugden on Vendors, ch. 12, § 3, p. 558 (7th edit.). See Bayley v. Greenleaf, 7 Wheat. R. 54, 55; Green v. Demoss, 10 Humph. 371.

⁵ Fisher v. Johnson, 5 Ind. 492.

⁶ Finch v. Earl of Winchelsea, 1 P. Will. 278; 4 Kent, Comm. Lect. 58, p. 154 (2d edit.).

⁷ See Bayley v. Greenleaf, 7 Wheat. R. 56; and Mackreth v. Symmons, 15 Ves. 354.

⁸ Brown v. Heathcote, 1 Atk. 160, 162; Jewson v. Moulson, 2 Atk. 417, 420; Mitford v. Mitford, 9 Ves. R. 87, 100; Worrall v. Morlar, cited in Mr. Cox's note to 1 P. Will. 459; Com Dig. *Bankrupt*, D. 19; Scott v. Surman, Willes, R. 402, and the Register's note; Simond v. Hilbert, 1 Russ. & Mylne, 729; *Ante*, § 1038, 1411.

chase-money being unpaid to the vendor, are deemed entitled to the same equities as any other *bonâ fide* particular purchasers.¹

[* § 1230. The lien created upon an estate, by the deposit of title deeds, as security for money, is very similar to a vendor's lien.²]

§ 1231. So, liens may be created on the purchase-money, due on the sale of an estate, in favor of a vendee, if it is agreed that the money shall be deposited in the hands of a third person, to be applied in discharge of prior incumbrances, to the extent of such incumbrances.³ Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons, who are volunteers, or have notice. For it is a general principle in equity, that, as against the party himself, and any claiming under him, voluntarily, or with notice, such an agreement raises a trust.⁴ Thus, if a tenant for life of real estate, should, by covenant, agree to set apart, and pay the whole, or a portion of the annual profits of that estate, to trustees for certain objects, it would create a lien, in the nature of a trust, on those profits against him, and all persons, claiming as volunteers, or with notice under him.⁵ So, if a father, on the marriage of his son, should covenant to settle lands of a particular annual value on his son, this would create a lien for that amount on his real estate generally, if he should die before he had settled any such lands according to his covenant.⁶ So, if a person should covenant that he will, on or before a certain day, secure an annuity by a charge upon freehold estates, or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled, before the date of the covenant, and the day so limited for its performance.⁷

¹ *Mitford v. Mitford*, 9 Ves. 100; *Bayley v. Greenleaf*, 7 Wheat. R. 56, 57.

² *Ante*, § 1020.

³ *Farr v. Middleton*, Prec. Ch. 174, 175.

⁴ *Collyer v. Fallon*, 1 Turn. & Russ. 469, 475, 476; *Legard v. Hodges*, 1 Ves. Jr. 478; *Ante*, § 1039 to 1058; *Dodsley v. Varley*, 12 Adolph. & Ellis, 632.

⁵ *Legard v. Hodges*, 4 Ves. Jr. 478.

⁶ *Roundell v. Breary*, 2 Vern. R. 482. See, also, *Power v. Bailey*, 1 Ball & Beatt. 49; *Gardner v. Townsend*, Coop. Eq. R. 303.

⁷ *Wellesley v. Wellesley*, 4 Mylne & Craig, 561; S. C. 10 Simons, 256; 17 Id. 59. In this case Lord Cottenham said: "That this court will grant a specific per-

[* § 1231 *a.* In a very recent case,¹ ordered to be heard before the full Court of Appeal, the subject of general covenants, to secure money upon lands, creating a specific lien upon all the covenantor's lands, is very thoroughly examined. The case of *Roundell v. Breary* was carefully revised, by reference to the registrar's book, and declared to have been incorrectly reported, being in fact one, in which there was an intention to charge particular lands, by reason of a schedule having been prepared for the purposes of the settlement; and the case of *Wellesley v. Wellesley*, which arose upon the same deed as the one now before the court, was held, either to have been decided upon the same view as that of *Roundell v. Breary*, or else that it ought not to be followed. The court finally declare, as their unanimous judgment, that a covenant, on or before a certain day, either by charge on freehold estates, in England or Wales, or by an investment in the funds, or by the best means which might be then in his power, to secure the payment of an annuity to a trustee for the wife of the covenantor, is not sufficient to create a charge on the covenantor's property.

formance of an agreement for a grant of an annuity, cannot now be questioned; and this agreement appears to me to contain within itself all that is necessary to give it legal validity; but if this court is to execute the agreement, it must do so according to the terms of it. The terms are, on a day certain, to charge the annuity on lands, or on an investment of stock, or by the best means in his power. I think it quite immaterial, for the present purpose, whether this gave to the husband an option, or whether he has other lands beside these vested in these defendants, upon which he can now charge the annuity; because the bill alleges that he refuses to charge it in any manner; and this court will not permit him, under the pretence of exercising an option, to evade the performance of his contract. In *Deacon v. Smith* (3 Atk. 323), there was an option; but it did not prevent the court from acting upon the one alternative. The property acquired, by the arrangement of December, 1834, must be considered as subsequently acquired property; but that contracts to charge property subsequently acquired, will be enforced, is sufficiently established. *Lyde v. Mynn*, and the cases upon which that decision was founded, are conclusive upon that subject. The contract is not to purchase lands for the purpose of the agreement; but one alternative is to charge lands in February, 1835, and at that time he had a power of charging lands. It is the same as a contract to charge such lands as he might have at that time; and if so, such was *Metcalf v. The Archbishop of York* (1 Mylne & Craig, 547; S. C. 6 Sim. 224), and *Lyde v. Mynn* (1 Mylne & Keen, 683; S. C. 4 Sim. 505), and such was *Tooke v. Hastings*, as reported in 2 Vern. 97. In *Lewis v. Maddocks* (17 Ves. 48), a contract upon marriage to settle all personal estate of which the husband might become possessed during the coverture, was enforced against an estate he had purchased, in part, with personal property so acquired.

¹ [* *Mornington v. Keane*, 2 De G. & J. 292.]

This we think must be regarded as the latest and most satisfactory decision upon the subject.¹

§ 1231 *b*. It has recently been decided in England that the owner of land taken by a railway for the purpose of its construction still retains a lien upon the land for the price, even after the railway has gone into operation, and that a court of equity will enforce such lien against the company taking the land, and all others in the exercise of their functions as lessees or otherwise.² The learned judge, Lord Romilly, M. R., said : " It is true that the rights of the public should be considered in these cases ; but the company cannot take property without paying for it, and then say it is for the interest of the public that the property should be used by them, and so deprive the vendor of his lien. The public can have no rights springing from injustice to others. The Great Eastern Railway Company have taken their lease, subject to the rights and equities enforceable against the purchaser of the land." We had occasion to examine the same question in a case in Vermont, and, without the aid of any prior determination, came, as far as we had occasion to go, to very nearly the same result already stated.³

§ 1231 *c*. There is a late case ⁴ where the purchaser of land, the grantor of which, upon his purchase of the same, had promised to pay a mortgage resting upon the land, was held bound, in equity, to pay such mortgage, notwithstanding his refusal, at the time of his purchase, to assume that incumbrance. The mortgagee having foreclosed the mortgage against the last purchaser and compelled payment, he was held to have no remedy against the original mortgagor, his grantor having assumed the debt, upon consideration, thus became the principal debtor, and the mortgagor afterwards remaining only a surety, and the last purchaser of the land knowing the facts, became himself a joint principal with his grantor, as to the original mortgagor, and could therefore have no redress against him, as a mere surety.

§ 1231 *d*. The essence of a mortgage is, that it was understood

¹ See *Post*, § 1249, where the subject is more fully discussed. A specific covenant to pay a certain sum out of the avails of the sale of specific land, or out of the land itself, creates a charge in the nature of a lien, which is enforceable in equity. *Pinch v. Anthony*, 8 Allen, 536.

² *Walker v. W. H. & B. Railway et als.* 12 Jur. N. S. 19.

³ *McAulay v. Western Vt. R. R. Co.* 33 Vt. R. 311.

⁴ *Chapman v. Beardsley*, 31 Conn. 115.

by the parties to the conveyance to be a security for a debt.¹ And it will make no difference that the written conveyance was absolute in form, if really intended and understood between the parties as a security for debt. The parol defeasance thus proved becomes effectual in law upon the ground of fraud in the grantee in denying the trust.²]

§ 1232. Upon similar principles, where a vendee has sold the estate to a *bonâ fide* purchaser without notice, if the purchase-money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase-money in the hands of such purchaser for satisfaction; for in such a case the latter, not having paid his money, takes the estate *cum onere*, at least to the extent of the unpaid purchase-money. And this proceeds upon a general ground, that, where trust-money can be traced, it shall be applied to the purposes of the trust.³

§ 1233. But, although a lien will be created in favor of a vendor for the purchase-money on the sale of an estate; yet, if the consideration of the conveyance is a covenant to pay an annuity to the vendor, and another covenant to pay a part of the money to third persons, it seems that the latter, not being parties to the conveyance, will not, generally, have any lien thereon for the payment of such money; for they stand in no privity to establish a lien, at least, unless the original agreement import an intention to create such a lien.⁴

[* § 1233 a. It has been decided that a solicitor, who had recovered a trust-estate on behalf of the trustees, and where the *cestuis que trust* had availed themselves of the recovery, had no lien on the deeds, or on the fund in court, as against the *cestuis que trust*, as the solicitor could have no higher claim against the deeds, or the fund, than that of his client, the trustee. And the trust-money having been invested in a manner not authorized by law, the *cestuis que trust* do not waive their right to pursue the trust-money into the unauthorized investment, by instituting a proceeding with a view to charge the trustee personally, and having

¹ Lokerson v. Stillwell, 2 Beasley, 357.

² Ibid.]

³ See Lench v. Lench, 10 Ves. 511; *Ex parte Morgan*, 12 Ves. 6; *Post*, § 1255 to 1262.

⁴ Clark v. Boyle, 3 Sim. R. 499; Foster v. Blackstone, 1 M. & Keen, 297; Collyear v. Countess of Mulgrave, 2 Keen, 81, 98; *Ante*, § 1227, and note 2, p. 480.

therein compelled him to dispose of the unauthorized securities for the trust-money, and he having in consequence paid the same into court.¹ And the fact that such trustees hold the legal title to the estate, so that they could give a good title to the purchaser, without the concurrence of the *cestuis que trust*,² will not give the solicitors a lien upon the deeds, or the fund in court, to reimburse the expenses of the sale. A solicitor who was joint trustee with two others, and, while acting as solicitor for all the trustees, received the moneys arising from the sale of the trust-estate, was held to have received them as trustee, and not as solicitor.³

§ 1233 *b*. Another class of cases, affected by similar principles, and where a sort of marshalling securities, or rights of priority between different incumbrancers and different purchasers, may exist, is, where a lien covers several parcels of land, and the owner thereof subsequently conveys some of the parcels to different purchasers or incumbrancers; in such cases, the question arises, who, as between the owner and the subsequent incumbrancers and purchasers, and also as between the incumbrancers and purchasers themselves, is primarily chargeable with the lien, and which of the lands is to be first subjected to the charge? The general rule now acted upon by courts of equity is, that where there is a lien upon different parcels of land for the payment of the same debt, and some of those lands still belong to the person, who, in equity and justice, owes, or ought to pay, the debt, and other parcels of the land have been transferred by him to third persons, his part of the land, as between himself and them, shall be primarily chargeable with the debt. This would seem highly reasonable as to the original incumbrancer.⁴ But it has been further held, that if he has sold or transferred different parcels of the land at different times, to different persons, as incumbrancers or purchasers, there, as between themselves, they are to be charged in the reverse order of the time of the transfers to them; that is to say, the parcels last sold are to be first charged to their full value,⁵ and so backwards,

¹ [**Francis v. Francis*, 5 De G. M. & G. 108.]

² *Groom v. Booth*, 1 Drewry, 548.

³ *Martindale v. Picquot*, 3 K. & J. 317.]

⁴ See the authorities cited in note 1 on page 463. See, also, *Patten v. The Agricultural Bank*, 1 Freem. 419; 8 Sm. & Mar. 357; *Mevey's Appeal*, 4 Barr. 80; *Caxton v. Harrier*, 1 Jones, 312.

⁵ See *Cowden's Estate*, 1 Barr. 267, overruling the case of the *Presbyterian Cong. v. Wallace*, 3 Rawle, 109, which had advanced a doctrine contrary to the

until the debt is fully paid ; for, it is said, that the last purchasers are to take only as far as they may, without disturbing the rights of the prior incumbrancers or purchasers, who, being prior in point of time, have a superiority of right.¹ But there seems great reason to doubt, whether this last position is maintainable upon principle ; for, as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive, that either has, in consequence thereof, any superiority of right or equity over the other.² On the contrary, there seems strong ground to contend, that the original incumbrance or lien ought to be borne ratably between them, according to the relative values of the estates. And so the doctrine has been asserted in the ancient as well as the modern English cases on the subject.³

§ 1234. Another species of lien is that which results to one joint owner of any real estate, or other joint property, from repairs and improvements made upon such property for the joint benefit, and

text. See, also, *Holden v. Pike*, 24 Maine, 427 ; *Wikoff v. Davis*, 3 Green, Ch. R. 24. [* See, also, *Chase v. Woodbury*, 6 Cush. 143 ; *Bradley v. George*, 2 Allen, 392 ; *George v. Kent*, 7 Allen, 16 ; *Gaskill v. Line*, 2 Beasley, 400.]

¹ *Gill v. Lyon*, 1 Johns. Ch. R. 447 ; *Stevens v. Cooper*, 1 Johns. Ch. R. 425 ; *Clowes v. Dickinson*, 5 Johns. Ch. R. 235 ; *Stoney v. Shultz*, 1 Hill, Ch. R. 500 ; *James v. Hubbard*, 1 Paige, R. 228 ; *Gouverneur v. Lynch*, 2 Paige, R. 300 ; *Guion v. Knapp*, 6 Paige, R. 35 ; *The Life Ins. Co. v. Cutler*, 3 Sandf. Ch. 176 ; *Skeel v. Spraker*, 8 Paige, R. 182 ; *Patty v. Pease*, 8 Paige, R. 277 ; *Schryser v. Teller*, 9 Paige, R. 173 ; *Commercial Bank of Erie v. Western Reserve Bank*, 11 Ohio (Stanton), R. 444, 452 ; *Green v. Ramage*, 18 Ohio, 428 ; *Ante*, § 506, 634 a ; *Hartley v. O'Flaherty*, 7 Lloyd & Goold, R. 216, Temp. Plunk. [See, also, *Stuyvesant v. Hone*, 1 Sandf. Ch. 419 ; *Stuyvesant v. Hall*, 2 Barb. Ch. R. 151.]

² *Ante*, § 477, 478, 483.

³ *Ante*, § 477, 478, 483 ; *Sir W. Herbert's case*, 3 Co. R. 12 ; *Barnes v. Rackster*, 1 Younge & Coll. New Rep. 401 ; *Ante*, § 634 a. See, also, *Lanoy v. Duchess of Athol*, 2 Atk. 448 ; *Aldrich v. Cooper*, 8 Ves. 391 ; *Averall v. Wade*, 1 Lloyd & Goold, R. 252 ; *Dickey v. Thompson*, 8 B. Monroe, 312, where the subject is ably examined ; *Morrisson v. Beckwith*, 4 Monroe, 76 ; *Bugden v. Bignold*, 2 Younge & Coll. New R. 377 ; *The American Law Magazine* for April, 1844, Art. 5, p. 64 to 82 ; *Sqfer v. Kemp*, 6 Hare, R. 155 ; *The Life Ins. Co. v. Cutler*, 3 Sandf. 176. [* But see the opinion in *Averall v. Wade*, Lloyd & Goold, R. 252, where the same principle is recognized as to a judgment lien. And if the debtor's portion of the lands is to be charged before that which he has conveyed, then by parity of reason should that last conveyed be first charged. We apprehend there is no doubt in regard to the entire soundness of the rule requiring such a discrimination. *Lyman v. Briggs*, 32 Vt. R. ; *Carter v. Neal*, 24 Ga. R. 346.]

for disbursements touching the same. This lien, as we shall presently see, sometimes arises from a contract, express or implied, between the parties, and sometimes it is created by courts of equity, upon mere principles of general justice, especially where any relief is sought by the party, who ought to pay his proportion of the money expended in such repairs and improvements; for, in such cases, the maxim well applies, *Nemo debet locupletari ex alterius incommodo*.¹

§ 1235. At the common law, if there are two tenants in common, or joint tenants of a house or mill, and it should fall into decay, and the one is willing to repair and the other is not; he that is willing to repair shall have a writ *de reparatione faciendâ*; for owners are bound, *pro bono publico*, to maintain houses and mills, which are for the habitation and use of man.² It is not, perhaps, quite certain, from the manner in which this doctrine is laid down, whether the writ applied merely to repairs on other things, constituting real estate, or appurtenant thereto. But it seems clear, that it did not extend to improvements (not being repairs) made upon real estate generally; nor to any cases, where the repairs were made under an express or implied contract; for, in the latter case, contribution could be obtained in a common action founded on the contract.

§ 1236. But the doctrine of contribution in equity is larger than it is at law; and, in many cases, repairs and improvements will be held to be, not merely a personal charge, but a lien on the estate itself. Thus, for example, it has been held, that, if two or more persons make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this will be a lien on the land, and a trust for the representatives of him who advanced it.³

¹ Jenkins's Cent. 4; Branch, Maxims, 124; *Post*, § 1237, 1238; Dig. Lib. 50, tit. 17, l. 206.

² Co. Litt. 200 *b*; *Loring v. Beacon*, 4 Mass. R. 576; *Doane v. Badger*, 12 Mass. R. 65; *Fitz. N. Brev.* 127 *a*. In *Converse v. Ferre* (11 Mass. R. 326), it was said, by Mr. Chief Justice Parker, in delivering the opinion of the court, that no action lies at the common law by one tenant in common, who has expended more than his share in repairing the common property against the deficient tenants. But this seems not easily reconcilable with what is said in *Doane v. Badger*, 12 Mass. R. 70, 71. See *Registrum Brev.* 153, and *Fitz. N. Brev.* 127. There certainly may be a distinction between a right by action to compel repairs, and a right of contribution *in invitum* after repairs made.

³ *Lake v. Craddock*, 1 Eq. Abr. 291; S. C. 3 P. W. 158; 2 Fonbl. Eq. B. 2,

§ 1237. In many cases of this sort, the doctrine may proceed upon the ground of some express or implied agreement as to the repairs and improvements between the joint purchasers, and an implied lien following upon such an agreement.¹ But courts of equity have not confined the doctrine of compensation, or lien, for repairs and improvements, to cases of agreement or of joint purchases. They have extended it to other cases, where the party making the repairs and improvements has acted *bonâ fide* and innocently, and there has been a substantial benefit conferred on the owner, so that, *ex æquo et bono*, he ought to pay for such benefit.² Thus, where a tenant for life, under a will, has gone on to finish improvements, permanently beneficial to an estate, which were begun by the testator, courts of equity have deemed the expenditure a charge, for which the tenant is entitled to a lien.³ So,

ch. 4, § 2, note (g); Sugden on Vendors, ch. 15, § 1, p. 637 (7th edit.). See, also, *Scott v. Nesbitt*, 14 Ves. 444. Mr. Sugden, in his *Treatise on Vendors* (ch. 15, § 1, p. 611, 7th edit.; *Id.* vol. 2, ch. 15, § 1, p. 131, 132, 9th edit.), says: "It seems, that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it, to repay him their shares of the purchase-money, or to convey their shares of the estate to him; for, by payment of all the money, he gains neither a lien nor a mortgage, because there is no contract for either. Nor can it be construed a resulting trust, as such a trust cannot arise at an after-period; and perhaps the only remedy he has, is to file a bill against them for a contribution. (See *Wood v. Birch*, and *Wood v. Norman*, *Rolls*, 7 and 8 March, 1804; the decree in which case does not, however, authorize the observation; but the author conceives it to follow, from what fell from the Master of the Rolls at the hearing.) Whenever, therefore, two persons agree to purchase an estate, it should be stipulated in the agreement, that if, by the default of either of them, the other shall be compelled to pay the whole or greater part of the purchase-money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs; unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time. But it has been held, that if one of two joint-tenants of a lease renew at his own expense, and the other party repay the full benefit of it, the one advancing the money shall have a charge on the other moiety of the estate for a moiety of his advances on account of the fines; although such other moiety of the estate be in strict settlement at the time of the renewal. The case was considered to fall within the principle, upon which mortgagees, who renew leasehold interests, have been decreed entitled to charge the amount upon the lands (*Hamilton v. Denny*, 1 Ball & Beat. 199)."

¹ See *Gladstone v. Birley*, 2 Meriv. R. 403.

² See Sugden on Vendors, ch. 26, § 10, p. 720, 721 (7th edit.); *Ante*, 799 b.

³ *Hibbert v. Cooke*, 1 Sim. & Stu. 552.

where a party, lawfully in possession under a defective title, has made permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements.¹

¹ *Robinson v. Bidley*, 6 Madd. R. 2. See also *Attorney-General v. Balliol College*, 9 Mod. R. 411; *Bright v. Boyd*, 1 Story, R. 478. In this case, the question was much discussed whether a *bonâ fide* purchaser under a defective title without notice, was entitled to be paid for his improvements upon the estate against the true owner. On that occasion the judge who delivered the opinion of the court said: "The other question as to the right of the purchaser *bonâ fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title, which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own that there does not seem to me any just ground to doubt, that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the Digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiores*. (Dig. lib. 50, tit. 17, l. 206.) I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law, from a *bonâ fide* possessor for a valuable consideration without notice, seeks an account in equity, as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. (2 Story on Eq. Jurisp. § 799 a, 799 b, 1237, 1238, 1239; *Green v. Biddle*, 8 Wheat. R. 77, 78, 79, 80, 81.) So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bonâ fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. (See also 2 Story, Eq. Jur. § 799 b, and note; *Id.* § 1237, 1238.) In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. (*Ibid.*) But it has been supposed, that courts of equity do not, and ought not to go further, and to grant active relief in favor of such a *bonâ fide* possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in *Putnam v. Ritchie* (6 Paige, R. 390, 403, 404, 405), entertained this opinion, admitting at the same time, that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bonâ fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and

So money, *bonâ fide* laid out in improvements on an estate by one joint-owner, will be allowed on a bill by the other, if he ask for a

improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bonâ fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that, in such a case, the true owner should recover and possess the whole, without any compensation whatever to the *bonâ fide* purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land, by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold, what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest, that the claim of the *bonâ fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity, and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited, shows it to be founded in the clearest natural equity. *Jure naturæ æquum est.* And the Roman law treats the claim of the true owner, without making any compensation, under such circumstances, as a case of fraud or ill faith. *Certe* (says the Institutes) *illud constat; si in possessione constituto ædifactor, soli Dominus petat domum suam esse, me solvat pretium materiæ et mercedes fabrorum; posse cum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui ædificavit. Nam scienti, alienum solum esse, potest obijci culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse.* (Just. Inst. lib. 2, tit. 1, § 30, 32; 2 Story on Eq. Jurisp. § 799 *b*; Vinn. Com. ad Inst. lib. 2, tit. 1, § 30, n. 3, 4, p. 194, 195.) It is a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land. (See Green v. Biddle, 8 Wheat. R. 79, 80.) The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate (*quatenus pretiosior res facta est*), (Dig. lib. 20, tit. 1, l. 29, § 2; Dig. lib. 6, tit. 1, l. 65; Id. l. 38; Pothier, Pand. lib. 6, tit. 1, n. 43, 44, 45, 46, 48,) and beyond what he has been reimbursed by the rents and profits. (Dig. lib. 6, tit. 1, l. 48.) The like principle has been adopted into the law of the modern nations which have derived their jurisprudence from the Roman law; and it is especially recognized in France, and enforced by Pothier, with his accustomed strong sense of equity and general justice, and urgent reasoning. (Pothier de la Propriété, n. 343 to 353; Code Civil of France, art. 552, 555.) Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *malâ fide* possessor ought to have an allowance of all expenses which have enhanced the value of the estate, so far as the increased value exists. (Pothier de la Propriété, n. 350; Vinn. ad. Inst. lib. 2, tit. 1, l. 30, n. 4, p. 195.) The law of Scotland has

partition.¹ So, if the true owner stands by, and suffers improvements to be made on an estate, without notice of his title, he will not be permitted in equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate.² For it has been well said: *Jure naturæ æquum est, neminem cum alterius detrimento et injuriâ fieri locupletiores*.³ *A fortiori* this doctrine

allowed the like recompense to *bonâ fide* possessors, making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *malâ fide* possessors to a limited extent. (Bell, Comm. on Law of Scotland, p. 139, § 538; Ersk. Inst. b. 3, tit. 1, § 11; 1 Stair, Inst. b. 1, tit. 8, § 6.) The law of Spain affords the like protection and recompense to *bonâ fide* possessors, as founded in natural justice and equity. (1 Mor. & Carl. Patid. b. 3, tit. 28, l. 41, p. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102.) Grotius, Puffendorf, and Rutherford, all affirm the same doctrine, as founded in the truest principles *ex æquo et bono*. (Grotius, b. 2, ch. 10, § 1, 2, 3; Puffend. Law of Nat. & Nat. b. 4, ch. 9, § 61; Rutherford, Inst. b. 1, ch. 9, § 4, p. 7.) There is still another broad principle of the Roman law, which is applicable to the present case. It is, that where a *bonâ fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him. (Dig. lib. 6, tit. 1, l. 65; Pothier, Pand. lib. 6, tit. 1, n. 43; Pothier, de la Propriété, n. 343.) Now, in the present case, it cannot be overlooked, that the lands of the testator, now in controversy, were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge to which they were liable by law. So, that he is now enjoying the lands, free from a charge which, in conscience and equity, he, and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has thus been relieved by the purchasers, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid a circuitry of action, to get back the money from the administrator, and thus subject the lands to a new sale, or at least, in his favor, in equity to the old charge. I confess myself to be unwilling to resort to such a circuitry, in order to do justice, where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge, to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable." The point was afterwards directly affirmed when the case came again before the court, in 2 Story, R. 605; *Ante*, § 387, 388, 799 a, 799 b.

¹ Swan v. Swan, 8 Price, R. 518.

² Green v. Biddle, 8 Wheat. R. 1, 77, 78; Shine v. Gough, 1 B. & Beatt. 444; Cawdor (Lord) v. Lewis, 1 Younge & Coll. 427; *Ante*, § 385, 387, 388, 799 a, 799 b; Bright v. Boyd, 1 Story R. 478, 493.

³ Dig. Lib. 50, tit. 17, l. 206.

will apply to cases where the parties stand in a fiduciary relation to each other; as, where an agent stands by, and without notice of his title, suffers his principal to spend money in improvements upon the agent's estate.¹

§ 1238. In all cases of this sort, however, the doctrine proceeds upon the ground, either that there is some fraud, or that the aid of a court of equity is required; for if a party can recover the estate at law, a court of equity will not, unless there is some fraud, relieve a purchaser, or *bonâ fide* possessor, on account of money laid out in repairs and improvements.²

§ 1239. The civil law seems to have proceeded upon a far broader principle of natural justice. For, by that law, any *bonâ fide* possessor, as, for instance, a creditor, who had laid out money in preserving, repairing, or substantially improving an estate, was allowed a privilege or lien for such meliorations. *Creditor, qui ob restitutionem ædificiorum crediderit, in pecuniam, quam crediderit, privilegium exigendi habebit.*³ *Pignus insulæ, creditori datum, qui pecuniam ob restitutionem ædificii exstruendi mutuam dedit, ad eum quoque pertinebit, qui redemptori, domino mandante, nimmis ministravit.*⁴ Indeed, Domat lays it down, as a general doctrine, that those whose money has been laid out on improvements of an estate, such as making a plantation, or erecting buildings upon it, or augmenting the apartments of a house, or for other like causes, have, by the civil law, a privilege upon those improvements, as upon a purchase with their own money.⁵

§ 1240. In the first place, in respect to repairs, improvements, and disbursements upon personal property. Here the civil law gave a privilege or lien upon the thing in favor of all artificers and other persons, who had laid out their money in such meliorations. Thus, it is said: *Quod quis navis fabricandæ, vel emendæ, vel ar-*

¹ Lord Cawdor v. Lewis, 1 Younge & Coll. 427.

² Sugden on Vendors, ch. 16, § 10, p. 721, 722 (7th edit.); Id. ch. 22, § 1, vol. 3, p. 436, 437 (10th edit.). See also Moore v. Cable, 1 Johns. Ch. R. 385; Green v. Winter, 1 Johns. Ch. R. 26, 39; Putnam v. Ritchie, 6 Paige, R. 390, 403 to 405; Bright v. Boyd, 1 Story, R. 478, 494 to 497; *Ante*, § 388, 389, 799 a, 799 b, and note.

³ Dig. Lib. 12, tit. 1, l. 25; 1 Domat, B. 3, tit. 1, § 5, art. 6, 7; Bright v. Boyd, 1 Story, R. 478, 494 to 497.

⁴ Dig. Lib. 20, tit. 2, l. 1; 1 Domat, B. 3, tit. 1, § 5, art. 5 to 7; *Ante*, § 1237, note.

⁵ 1 Domat, B. 3, tit. 1, § 5, art. 7; *Ante*, § 1237, note.

*mandæ, vel instruendæ, causâ, vel quoquo modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum.*¹

§ 1241. The like privilege or lien does not exist in English jurisprudence in respect to domestic ships.² But, in America, it has been held to exist in regard to foreign ships, repaired in home ports, and also, in regard to domestic ships, repaired in foreign ports, in favor of artificers and material-men.³ And a master of a ship, who has paid for such repairs, is substituted, in point of claim, to the rights of such artificers and material-men. He has also, by our law, a lien on the freight for his disbursements on the voyage,⁴ although the lien has been recently denied in England.⁵

§ 1242. Upon another point, also, some diversity of judgment has been expressed; and that is, how far, as between part-owners, a lien exists on the ship itself for any expenses incurred by one or more of them beyond their shares in building, repairing, or fitting out the ship upon a joint voyage. In respect to the proceeds of the joint adventure on the voyage, no doubt seems to be entertained that they are liable to the disbursements and charges of the outfit, in the nature of a lien, and therefore, that no part-owner can take any portion of the profits, until after such expenditures are paid and deducted. In this respect the part-owners are treated

¹ Dig. Lib. 42, tit. 5, l. 34, 36; 1 Domat, B. 3, tit. 1, § 5, art. 7, 9; Story, Comm. on Agency, § 355 to 357; *Ante*, § 506.

² Abbott on Shipp. Pt. 2, ch. 2, § 10, p. 108, § 11, p. 109 (edit. 1829); *Ex parte Bland*, 2 Rose, Cas. 91; *Watkinson v. Bernardiston*, 2 P. Will. 367; *Stewart v. Hall*, 2 Dow, R. 29. See *Hussey v. Christie*, 13 Ves. 594; *Ex parte Halkett*, 3 V. & Beam. 135.

³ Abbott on Shipp. Pt. 2, ch. 2, § 15, note by Story (1) (edit. 1829); *The Aurora*, 1 Wheat. R. 105; *The General Smith*, 4 Wheat. R. 438; *The St. Jago de Cuba*, 9 Wheat. R. 409, 416; *Peyroux v. Howard*, 7 Peters, R. 324. See *Boon v. The Hornet*, Crabbe, R. 426; *Sarchet v. The Sloop Davis*, Id. 185.

⁴ Abbott on Shipping, *ubi supra*; *Ex parte Cheesman*, 2 Eden, R. 181; *The Ship Packet*, 3 Mason, R. 263, 264; *Hodson v. Butts*, 3 Cranch, 140; *Milward v. Hallett*, 2 Cain. R. 77; *White v. Baring*, 4 Esp. R. 22; *Ante*, § 1216.

⁵ In the case of *Hussey v. Christie* (9 East, R. 426), the Court of King's Bench decided, that the master has no such lien on the freight. Lord Eldon seems to have entertained a different opinion in *Hussey v. Christie*, 13 Ves. 594; *Ex parte Halkett*, 3 Ves. & B. 135; S. C. 19 Ves. 474. So did Lord Northington, in *Ex parte Cheesman*, 2 Eden, 181. In the case of *Smith v. Plummer*, 1 Barn. & Ald. 575, the Court of King's Bench held, that the master had no lien, even on the freight, for his disbursements on the voyage, on account of the ship. That doctrine has not been adopted in America, and seems not quite reconcilable with prior decisions. See also *Richardson v. Campbell*, 5 Barn. & Ald. 203, note (a).

as partners in the joint adventure.¹ But the point, whether the ship itself is liable for such expenditures, as constituting a lien on it, turns upon somewhat different considerations. Lord Hardwicke held, that the ship was so liable; and that the part-owners of a ship, although tenants in common, and not joint-tenants, have a right, notwithstanding, to consider the chattel as used in partnership, and liable, as partnership effects, to pay all debts whatever, to which any of them are liable on account of the ship.² Lord Eldon has expressed a directly contrary opinion; and has held the ship not to be liable for such expenditures.³

§ 1243. Another species of tacit or implied trust, or, perhaps,

¹ Abbott on Shipping, Pt. 1, ch. 3, § 9, 10, p. 77, 78 (edit. 1829).

² *Doddington v. Halkett*, 1 Ves. R. 497, and Belt's Supplement, 205, 206; Abbott on Shipping, Pt. 1, ch. 3, § 10, p. 78 (edit. 1829).

³ *Ex parte Younge*, 2 Ves. & B. 242; *Ex parte Harrison*, 2 Rose, Cas. 76, 78. See also *Patton v. Schooner Randolph*, Gilpin, R. 457; *Braden v. Gardner*, 4 Pick. 456; *Merrill v. Bartlett*, 6 Pick. 46. Mr. Abbott, in his Treatise on Shipping, expressed doubts as to the correctness of Lord Hardwicke's judgment. Lord Eldon, in *Ex parte Younge*, 2 Ves. & Beam. 242, adopted Mr. Abbott's doubts; and the remarks of the latter having been omitted in the last English edition, I take the liberty to restore them. They are as follows: "It seems to have been considered, that part-owners might have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandise. But I do not find this point to have been ever decided; and there is a material difference between the two cases. Partners are, at law, joint-tenants of their merchandise. One may dispose of the whole property. But part-owners are tenants in common of a ship. One cannot sell the share of another. And, if this general lien exists, must prevail against a purchaser, even without notice; which does not seem consistent with the nature of the interest of a tenant in common. It is true, indeed, that as long as the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits, until all that is due in respect to the part he holds in the ship has been discharged. But, as one part-owner cannot compel another to sell the ship, there does not appear to be any mode by which he can enforce against the other's share of the ship, in specie, the payment of his part of the expenses." In *Mumford v. Nicoll* (4 Johns. Ch. R. 522), Mr. Chancellor Kent acted upon the authority of the case, *Ex parte Younge*, in opposition to the case of *Doddington v. Halkett*. But his decree was overturned by the Court of Appeals, in 20 Johns. R. 611, where the majority of the judges, who delivered their opinions, seemed inclined to support the opinion of Lord Hardwicke. And in the case before them, which was somewhat special in its circumstances, where the parties were part-owners, and engaged in the partnership adventure, in which the ship was eventually sold, and one of the part-owners got possession of the proceeds, the court held him entitled to retain for out-fits, repairs, and expenses incurred by him for the voyage, but not for a general balance due on former voyages and adventures.

strictly speaking, of tacit or implied pledge or lien, is that of each partner in and upon the partnership property, whether it consists of lands, or stock, or chattels, or debts, as his indemnity against the joint debts, as well as his security for the ultimate balance due to him for his own share of the partnership effects.¹ We have already had occasion to allude to this sort of lien.²

§ 1244. Another class of implied liens or trusts arises, where property is conveyed *inter vivos*, or is bequeathed or devised by last will and testament, subject to a charge for the payment of debts, or to other charges in favor of third persons.³ In such cases, although the charge is treated, as between the immediate parties to the original instrument, as an express trust in the property, which may be enforced by such parties or their proper representatives; yet, as between the trustee and *cestuis que trust*, who are to take the benefits of the instrument, it constitutes an implied or constructive trust only; a trust, raised by courts of equity in their favor, as an interest *in rem*, capable of being enforced by them directly by a suit brought in their own names and right. Thus, for example, if a devise is made of real estate, charged with the payment of debts generally, it may be enforced by any one or more creditors against the devisee, although there is no privity of contract between him and them.⁴

§ 1245. There is, also, a distinction between a devise of an estate in trust, to pay debts and other charges, and a devise of an estate charged with, or subject to, debts or other charges. In the former case, the devise is construed to be a mere trust to pay the debts or other charges, giving no beneficial interest to the devisee, but holding him, after the debts and charges are paid, a mere trustee for the heir, as to the residue. In the latter case, the devise is construed to convey the whole beneficial interest to the devisee, subject only to the payment of the debts, or other charges. The distinction may seem nice; but it is clearly established as a matter of intention.⁵

¹ Collyer on Partn. B. 2, ch. 1, § 1, p. 65; *West v. Skipp*, 1 Ves. 239, 456; *Hoxie v. Carr*, 1 Sumner, R. 181, 182; *Nicoll v. Mumford*, 4 Johns. Ch. R. 522; *Lake v. Gibson*, 1 Eq. Abr. A. 3, p. 290, 291; *Ante*, § 674, 675; *Post*, § 1253.

² *Ante*, § 1207; *Post*, § 1253. See also *Ante*, § 674, 675.

³ See *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 2, p. 94 to 134.

⁴ See *King v. Denison*, 1 Ves. & B. 272, 276.

⁵ *King v. Denison*, 1 Ves. & Beam. 273; *Hill v. Bishop of London*, 1 Atk. R. 620; *Craig v. Leslie*, 3 Wheat. R. 582, 583; 2 Madd. Ch. Pr. 112. — Lord Eldon,

§ 1246. Charges, of the nature which we are now considering, are often created by the express and positive declarations of deeds and wills; but they not infrequently also arise by implication from general forms of expression used in such instruments. Thus, in cases of wills, a testator often devises his estate, "after payment of his debts"; or "his debts being first paid"; or he begins by directing, "that all his debts shall be paid"; and afterwards he makes a full disposition of his estate. The question in such cases has often arisen, Whether his debts are to be treated as a charge upon his real estate; or, in other words, Whether he has given all his real estate to the devisees, subject to, and chargeable with, his debts, in aid of his personal estate. The settled doctrine now is, that the debts, in all such cases, constitute, by implication, a charge on the real estate;¹ for, whether the direction be in the in-

in *King v. Denison*, 1 Ves. & Beam. 272, stated this distinction in a very clear manner. "But I will here," said he, "point out the nicety of distinction, as it appears to me, upon which this court has gone. If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose. The latter is a devise for a particular purpose with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But, where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee; as it is intended to be given to him."

¹ *King v. Denison*, 1 Ves. & B. 273, 274; *Knightly v. Knightly*, 2 Ves. Jr. 328; *Shallcross v. Findon*, 3 Ves. 738; *Williams v. Chitty*, 545; *Clifford v. Lewis*, 6 Madd. Ch. Pr. 33; *Lupton v. Lupton*, 2 Johns. Ch. R. 623; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 2; 1 Madd. Ch. Pr. 483 to 488. The cases are very fully and ably collected by Mr. Jarman, in his edition of *Powell on Devises*, vol. 2, ch. 34, p. 644 to 653; *Graves v. Graves*, 8 Sim. R. 43, 54 to 56. This last case was exceedingly strong. The testator, by his will, directed all his debts, legacies, and personal charges to be paid as soon as conveniently might be after his death; afterwards he devoted a particular estate to the payment of his debts, legacies, and personal charges in aid of his personal estate; and he decreed the residue of his estate in strict settlement. It was held, that the preliminary words charged all his real estate; and that the subsequent words did not cut down the intent to the particular estate. But, that all the real estate was liable, if the specific real estate would not pay all the debts, legacies, and personal charges. *Dover v. Gregory*, 10 Simons, R. 393; *Parker v. Marchant*, 1 Younge & Coll. New R. 290.

troductio or in any other part of the will, that all the debts of the testator shall be paid, or the devise be of his real estate after the payment of all his debts, it is deemed equally clear, that he intends that all his debts shall be paid; which, in case of a deficiency of his personal assets, can be done only by charging his real estate. The testator is thus deemed to intend to perform an act of justice, before he does an act of generosity. This course of decision has undoubtedly been produced by a strong desire, on the part of courts of equity, to prevent gross injustice to creditors, and to compel debtors to do that which is morally right and just; or, as it has been expressively said, that men may not sin in their graves.¹

§ 1247. The principal exceptions to this doctrine seem to be reducible to two heads: first, where the testator, after generally directing his debts to be paid, (without charging any funds expressly,) has provided or pointed out a specific fund for that purpose;² secondly, where the debts are directed to be paid by the executors, and no lands are devised to them, to which, by implication, the debts could be attached.³ Each of these exceptions proceeds upon the same ground of presumed intention in the testator. If the testator assigns a specific fund for the payment of his debts, that (naturally enough) is construed to exclude any intention to appropriate a more general fund for the same purpose; *Expressio unius est exclusio alterius*.⁴ If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds, with which he is intrusted, and not out of other funds, over which he has no control. If the executor is pointed out, as the person to pay, that excludes the presumption, that other persons, not named, are required to pay.⁵ The distinction seems very

¹ Thomas v. Britnell, 2 Ves. 314; 2 Powell on Devises, by Jarman, ch. 34, p. 653; Price v. North, 1 Phillips, Ch. R. 83.

² Thomas v. Britnell, 2 Ves. 313; 2 Powell on Devises, by Jarman, ch. 34, p. 653, 654. But see Graves v. Graves, 8 Sim. R. 43; *Supra*, § 1246, note (1); Price v. North, 1 Phillips, Ch. R. 83.

³ Brydges v. Landen, cited 3 Ves. Jr. 550; Keeling v. Brown, 5 Ves. 359; Powell v. Robins, 7 Ves. 209; Willan v. Lancaster, 3 Russ. R. 108; 2 Powell on Devises, by Jarman, ch. 34, p. 654; Symons v. James, 2 Younge & Coll. New R. 301.

⁴ But see Graves v. Graves, 8 Sim. R. 43, 54 to 56; *Ante*, § 1246, note (1).

⁵ The same general doctrines, with the like exceptions, will, perhaps, apply to cases, where legacies, as well as debts, are in question, although formerly a distinction was certainly taken between them. See Knightly v. Knightly, 2 Ves. Jr.

nice ; but it is intelligible in theory, however difficult it may be in its application to particular cases.

§ 1247 *a.* Perhaps it would have been more satisfactory and conformable to the real intention of the testator, in all cases of this sort, to have held, that, where the testator directed all his debts to be paid, without specifying any particular fund, out of which they were exclusively to be paid, it should, in the absence of all positive controlling words, be construed as a general declaration, that all his debts should be paid out of his estate, whether real or personal, (the latter being the primary, and the former the secondary fund, for this purpose,) without any regard to the person, who might be directed as executor, or otherwise, to pay them ; except, that he was to be deemed the immediate trustee, or conduct, through whom the duty was to be discharged. But, whether this suggestion be well founded, or not, it is certain, that the more recent authorities do not appear to place any stress upon the fact, that the executor is himself directed to pay the debts, if he be also devisee of the estate, or residuary legatee and devisee, as well as executor ; for, in such a case, the presumption, that he is solely to pay out of the personal estate, or funds in his hands, as executor, is repelled by showing that the real estate is also under his control

328 ; *Chitty v. Williams*, 3 Ves. 551 ; *Keeling v. Brown*, 5 Ves. 361 ; *Davis v. Gardner*, 2 P. Will. 187, and Mr. Cox's note (1) ; *Trott v. Vernon*, Prec. Ch. 430 ; 2 *Powell on Devises*, by Jarman, ch. 34, p. 659 to 663 ; 1 *Roper on Legacies*, by White, ch. 12, § 2, p. 574 to 595. Where the executor is devisee of the real estate, a direction to him to pay debts and legacies will amount to a charge of both debts and legacies on the real estate. *Aubrey v. Middleton*, 2 Eq. Abr. 497, pl. 16 ; *Alcock v. Sparhawk*, 2 Vern. 228 ; S. C. 1 Eq. Abr. 198, pl. 4 ; *Barker v. Duke of Devonshire*, 3 Meriv. R. 310 ; 2 *Powell on Devises*, by Jarman, ch. 34, p. 657, 658. But, if a limited interest were given in the realty to the executor, or to one of the executors only, it might be different. See *Keeling v. Brown*, 5 Ves. 359. Where a testator devised his lands in trust to be sold, declaring that the produce should go in the same manner as the personal estate, and afterwards he made a bequest of his personal estate, "after payment of his debts" ; it was held that the real estate was charged with the debts. *Kidney v. Coussmaker*, 1 Ves. Jr. 436. A devise of the residue of the testator's estate, with a previous direction to pay debts and legacies, will amount to a charge upon the real estate. *Hassel v. Hassel*, 2 Dick. R. 526 ; *Aubrey v. Middleton*, 2 Eq. Abr. 497, p. 16 ; *Bench v. Biles*, 4 Madd. R. 187 ; 2 *Powell on Devises*, by Jarman, ch. 34, p. 657, 661. The distinctions in many of the cases are extremely nice ; and it is not practicable to give them at large without occupying too large a space in this work. See, also, *Henvell v. Whitaker*, 3 Russ. R. 343 ; *Dover v. Gregory*, 10 Simons, R. 393.

and management. Therefore, where the testator, by his will, directed all his just debts and funeral charges to be paid and satisfied, by his executor thereafter named, and then, after giving legacies and an annuity, he gave all his real and personal estate to his nephew A., and absolutely appointed him executor ; it was held, that the debts were chargeable on the real estate.¹ So, where the testator ordered all his just debts and funeral charges, and the charges of proving his will, to be fully discharged by his executor, thereafter named ; and, after giving several pecuniary legacies, he devised to his son A. all his copyhold estates, which had been surrendered to the use of his will, and gave him the rest and residue of his estate and effects of what nature or kind soever, and appointed him sole executor and residuary legatee ; it was held, that the debts were chargeable upon the real estate.²

¹ *Henvell v. Whitaker*, 3 Russ. R. 343 ; *Finch v. Hattersley*, 3 Russ. R. 345, note.

² *Dover v. Gregory*, 10 Simons, R. 393, 399. On this occasion, the Vice-Chancellor (Sir L. Shadwell) said : " I perfectly well recollect, that the case of *Henvell v. Whitaker* was argued, with great earnestness, on both sides ; and, I must say, that, in my opinion, the decision in that case is right. I am willing that this will should be construed according to the intention of the testator. First of all, there is a plain intention that the executor should pay the debts, and the funeral expenses, of course ; and it does not amount to an evidence of intention, that he is not to pay the debts, because he is to pay the funeral expenses. And, as the testator says : ' I order and ordain, that all my just debts and funeral expenses, and the charges of proving this my will, shall be fully discharged by my executor hereinafter named,' he denotes an intention, that his executor should pay his debts, and should pay them by the means which the testator has supplied him with, either by gift of property or by suffering it to descend. If the heir had been a stranger, there would have been sufficient, in the will, to enable him to take the fee. There is an intention that he should pay the debts ; and the fact, that the testator gives the copyholds without words of inheritance, shows that he meant that the debts should be paid out of the copyholds. The court, in construing a will, is bound to give a meaning to every word, if it can ; and not to reject any words as being surplusage, if it can be avoided. I admit, that the expression, ' residuary legatee,' ordinarily, would apply to a person, who is to take the undisposed of personal estate. But, where the testator has given all the rest and residue of his estate and effects whatsoever and wheresoever, or of what nature or kind soever, unto, and to the use of his son, John Ayer, and then says, ' whom I hereby appoint sole executor and residuary legatee of this my will,' those words may be fairly construed to mean, that he intended his son should take all his property, of every description, which he had not before given. I think, that I am bound by the case of *Henvell v. Whitaker*, to hold, that the debts, in this case, are charged on the copyholds." See *Parker v. Marchant*, 1 Younge & Coll. New R. 290. See, when

§ 1248. Another class of implied liens or trusts arises, or rather is continued by implication, where a party, who takes an estate, which is already subject to a debt, or other charge, makes himself personally liable by his own express contract or covenant for the same debt or charge. In such a case the original lien or charge is not only displaced thereby, but the real estate is treated throughout as the primary fund. So that, in case of the death of the debtor, as between his heirs, devisees, and distributees, the debt, if paid out of his personal assets, will still be deemed a primary charge upon the real estate; and, as such, followed in favor of creditors, legatees, and others entitled to the personal assets.¹ Thus, for example, where a settler, upon a marriage settlement, created a trust term in his real estate for the raising of portions, and also covenanted to pay the amount of the portions; it was held to be a charge primarily on the real estate; and the personal estate to be auxiliary only. On that occasion it was said, by the Master of the Rolls, (Sir William Grant,) "It is difficult to conceive, how a man can make himself a debtor, (although by the same instrument he charges the real estate,) without subjecting his personal assets in the first instance to the payment of the debt. Here the settler certainly makes himself a debtor by his covenant. Where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge still remains primarily on the real estate; and the covenant is only a collateral security; because the debt is not the original debt of the covenantor."²

the personal estate is deemed exonerated by a charge of debts upon the real estate, *Colville v. Middleton*, 3 Beavan, R. 570. [* See *Harper v. Munday*, 7 De G. M. & G. 369.];

¹ *Ante*, § 574, 1003; 1 Madd. Ch. Pr. 397.

² *Lechmere v. Charlton*, 15 Ves. 197, 198; *McLearn v. McLellan*, 10 Peters, R. 625; *Ante*, § 1003; 1 Madd. Ch. Pr. 397. There are many other cases, in which, although the party covenants to pay money, the land is treated as the primary fund, to be applied to discharge the debt. Some of these cases have already been mentioned under the head of *Marshalling Assets*, in the first volume of this work. *Ante*, § 574 to 576. A curious question arose in the case of *McLearn v. McLellan*, 10 Peters, R. 625. There A. had purchased a plantation, on which he put slaves, and paid part of the purchase-money in his lifetime, and gave a judgment for the residue. He then died, leaving his son B. his devisee of the land and slaves. B., in order to obtain possession of the land mortgaged, gave his own bond, secured by a mortgage on the land and slaves, for the remaining unpaid part of the judgment. B. afterwards died, leaving a part of the debt unsatisfied; and afterwards the mortgage was foreclosed, and the debt paid by a sale of the

[* § 1248 *a*. The same rule extends to all incumbrances upon land, devised or descended, where the incumbrance is not the lands decreed on the foreclosure. The next of kin of A. were aliens, capable of taking his personal estate, but incapable of taking lands; and the latter, therefore, descended to other persons, who were citizens. One question was, Whether, under all the circumstances, the unpaid purchase-money ought to be borne out of the personal estate, or out of the real estate of B. The heirs of the real estate insisted, that it ought to be paid out of the personal estate, and so they were entitled to come on the personal estate for the amount for which the land was sold. The court held that it ought to be apportioned on both funds. Mr. Justice McLean, in delivering the opinion of the court, said: "The important question must now be considered, how this mortgage debt shall be discharged. Shall it be paid out of the real estate, or out of the personal, or out of both? That the land should not be wholly exempt from this incumbrance, is clear by every rule of equity, which applies to cases of this description. In addition to the consideration, that the mortgage binds the land, the fact, that a considerable part of the debt was incurred for its purchase, cannot be wholly disregarded. Nor would it comport with the principles of equity to make the whole debt a charge upon the land, to the exemption of the personal property; as the lien of the mortgage covers the personal as well as the real property, and as at least a part of the debt was contracted on other accounts than the purchase of the land. The rights of the foreign heirs, under the laws of Georgia, are to be regarded equally as those of the domestic heirs. Each have interests in the property of the deceased, which are alike entitled to the consideration and protection of a court of chancery. Suppose James H. McLearn had died leaving a will, by which he devised different tracts of land to different persons capable of taking by devise, and the entire real estate was incumbered by a mortgage, or other lien, which, after the will took effect, had been paid by sale of one of the tracts of land. Could a court of chancery hesitate, in such a case, to require a contribution from the devisees, not affected by the sale, so as to make the lien a charge upon all the land? The plainest dictates of justice would require this, whether regard be had to the rights of the devisees, or to the intention of the testator. And is not the case put analogous to the one under consideration? By the act of the elder McLearn, his property, both real and personal, was incumbered. The heirs, both foreign and domestic, of the younger McLearn, who take this property, take it charged with the continued incumbrance. That James McLearn had a right, and was bound to continue this charge upon his property, no one will dispute. He might have left the debt, with the consent of the creditor, if there had been no prior lien to be discharged out of his estate, as the law authorized; and, in such case, it would have been payable out of the personal estate. Or he might have made the debt a specific charge on his personal property, or on his real. But he did neither. He charged its payment, in pursuance of the judgment lien, on his property, both personal and real. This lien, as between the distributees, fixes the rule, by which their rights must be decided. The domestic heirs cannot claim to receive the land free from the lien of the mortgage, nor can the foreign heirs claim the personal property exempt from it. In equity, it would seem, that each description of heirs should contribute to the payment of the mortgage debt, in proportion to the fund

proper debt of the deviser or ancestor. The debt or incumbrance remains a charge upon the land merely, and is not entitled to ex-
received. This rule, while it would do justice to the parties, would give effect to the intention of the ancestor. That intention is clearly shown by the lien created on the property; and, by the rules of equity, such intention must be regarded. The decision of this case must rest upon familiar and well-established principles in equity; and these principles will be shown by a reference to adjudicated cases. In the case of *Pollexfen v. Moore*, 3 Atk. 272, it appears Moore, in his lifetime, agreed to purchase an estate from the plaintiff, for £ 1,200, but died before he had paid the whole purchase-money. Moore, by will, after giving a legacy of £ 800 to the defendant, his sister, devises the estate purchased, and all his personal estate, to John Kemp, and makes him his executor. The executor commits a devastavit on the personal estate, and dies, and the estate descends upon his son and heir at law. Pollexfen brought his bill against the representative of the real and personal estate of Moore and Kemp, to be paid the remainder of the purchase-money. Mrs. Moore, the sister and legatee of Thomas Moore, brings her cross-bill, and prays, if the remainder of the purchase-money should be paid to Pollexfen, out of the personal estate of Moore and Kemp, that she may stand in his place, and be considered as having a lien upon the purchased estate, for her legacy of £ 800. And the Lord Chancellor said: 'That the estate, which has descended from John Kemp, the executor of Moore, upon Boyle Kemp, comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and, in order to relieve Mrs. Moore, I will direct Pollexfen to take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and will leave this last fund open, that Mrs. Moore, who can, at most, be considered only as a simple contract creditor, may have a chance of being paid out of the personal assets.' This case shows, that, in England, the rule, which requires the personal property to be first applied in the payment of debts, is deviated from where the justice of the case, and the rights of parties interested, require it. Had the debt due to Pollexfen been directed to be paid out of the personal property, it would have left no part of that fund to pay the legacy of Mrs. Moore; and, for this reason, the debt was decreed to be paid out of the land. Now, if the mortgaged debt in the present case shall be directed to be paid out of the personal fund, it would defeat the foreign heirs, whose claim to this property, under the law of Georgia, cannot be less strong than a bequest. In 3 Johns. Ch. Rep. 252, it is laid down, as between the representatives of the real and personal estate, that the land is the primary fund to pay off a mortgage. And in 2 Bro. 57, Lord Kenyon, as Master of the Rolls, laid down the same rule; that, where an estate descends, or comes to one subject to a mortgage, although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed, yet that shall not bind his personal estate. There is no doctrine better established, than that the purchase of land, subject to a mortgage debt, does not make the debt personal; and, on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed, where additional security has been given. In the case of *Evelyn v. Evelyn*, 2 P. Wms. 659, where A. mortgaged the land for £ 1,500, his son B. covenanted with the assignee of the mortgagee to pay the money. He succeeded to

operation out of the personal estate, or out of other lands.¹ This doctrine is thus defined, by the learned judge in *Hewes v. Dehon* :

the premises after the death of his father, and died intestate. The question was, Whether his personal estate, under the covenant, should be applied in payment of the mortgage; and it was decided, that the land should be charged, and the covenant was only considered as additional security. In the case of *Waring v. Ward*, 7 Ves. 334, Lord Eldon says: 'The principle upon which the personal estate is first liable in general cases, is, that the contract, primarily, is a personal contract, the personal estate receiving the benefit; and, being primarily a personal contract, the land is bound only in aid of the personal obligation to fulfil that personal contract.' It has long been settled, therefore, that, upon a loan of money, the party meaning to mortgage, in aid of the bond, covenant, or simple contract debt, if there is neither bond nor covenant, his personal estate, if he dies, must pay the debt for the benefit of the heir. But suppose a second descent cast, and the question arises, the personal estate of the son, and his real estate having descended to the grandson; then the personal estate of the son shall not pay it, as it never was the personal contract of the son. And this is the well-established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract; and, on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal. But if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor. And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way, that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees. In the case under consideration, the mortgage was given by James H. McLearn, but was not given to secure a debt created by him. The mortgage merely changed the security, but did not affect the extent of the judgment lien. And this judgment was obtained chiefly for the purchase-money of the estate. In effect, the debt, for which the judgment was obtained against Archibald McLearn, and for which the mortgage was given, constituted an equitable lien on the land; and had the mortgage covered only the land, it must have been considered the primary fund. The debt, for which the mortgage was given, was not the personal contract of James H. McLearn, but the contract of his ancestor, in the purchase of the estate. But if the contract was personal, and might have been a charge on the personal estate devised to James H. McLearn, yet the character of the debt in this respect is changed in the hands of the present heirs. In the language of Lord Eldon, this debt cannot be a charge on the personalty, because it was not created by the personal contract of James H. McLearn. This, under the authorities cited, would be the rule for the payment of the mortgage debt, if James H. McLearn had not executed a mortgage on the personal, as well as the real property, which, as devisee, he received from his father. This mortgage on the personal property cannot be considered in the light of additional security to the lien, which before existed. If it could be considered in this light, the land would still be the primary fund, and the personal mortgage as surety or auxiliary to the land.

¹ [* *Hewes v. Dehon*, 3 Gray, R. 205, 208.]

“The rule, however, we may remark by way of caution, requiring incumbrances upon the real estate to be paid from the personal property, where no other intent is expressed in the will, is to be confined to incumbrances created by the testator or his ancestor, and is not to be extended to cases where the testator or ancestor purchased the estate subject to the incumbrance, unless the testator or his ancestor had rendered himself personally liable therefor.”

§ 1248 *b*. But it is not sufficient, to make the incumbrance a charge upon the personal estate, that the devisor or ancestor might have been compelled to pay the same, as between himself and the original debtor, creating the charge.¹ For that is always the case, as between the grantor and grantee of an incumbered estate.² To

But this mortgage can, in no respect, be considered as additional security. It might have been so considered in reference to the equitable lien of the vendor for the purchase-money, as such lien was limited to the land; but the lien of the judgment obtained against the ancestor of James H. McLearn, and for which the mortgage was substituted, extended, as before remarked, to the personal as well as real estate, of the defendant. The debt, then, for which the mortgage was given, did not arise from the personal contract of James H. McLearn, but by the contract of his ancestor; and the mortgage was given in discharge of the judgment. This created no new lien upon the personal property. It came to James H. McLearn, under the will of his father, subject to the lien of the judgment. The mortgage, then, did not, and was not intended to create any new charge upon the personalty; but to continue, in a different form, that which already existed. In this view, the charge upon the personal estate can no more be disregarded than the charge upon the real; and, in this respect, this case differs from the cases referred to. The charge, on both funds, under the mortgage, may be compared to a will devising the funds to the respective heirs now before the court, as the statute provides; and leaving the debts as a charge upon his real and personal property. Can any one doubt, that such a bequest would be considered, by a court of chancery, as a charge upon both funds? Now, although James H. McLearn has made no will, as in the supposed case, yet he gave a mortgage to continue the charge on the personal property, which existed under the judgment; and the law of Georgia fixes the rule of descent. This act of the ancestor, connected with the Georgia law of descent, gives as decided and clear a direction to the property, both real and personal, under the mortgage, as if, in his last will, James H. McLearn had so devised it. Both funds being charged with the mortgage debt, must be applied to its payment, in proportion to their respective amounts. And as the property, both real and personal, has been converted into money, the proportionate part of each can be applied to this payment without difficulty.” See, also, *Berrington v. Evans*, 3 *Younge & Coll.* 384, 392.

¹ [* *Scott v. Beecher*, 5 *Mad. Ch. R.* 96.

² *Campbell v. Shrum*, 3 *Watts*, 60; *Trevor v. Perkins*, 5 *Wharton*, 244.

have this effect, the devisor or ancestor must have assumed the debt, as between himself and the creditor, in the incumbrance; and it will not be sufficient that he has entered into a bond or covenant with the debtor to see him harmless in regard to it.¹ The rule is thus expressed by the most distinguished of the American chancellors:² “As to other acts of the purchaser, in his lifetime, in order to charge his personal estate, as the primary fund, he must make himself, by contract, personally and directly liable, at law, for the debt to the owner of the incumbrance; and even a covenant or bond for the purpose will not be sufficient, unless accompanied with circumstances showing a decided *intention* to make thereby the debt personally his own.”

§ 1248 *c.* In England and in the State of New York this matter has been made the occasion of statutory provisions,³ by which all incumbrances upon land descended or devised are made a primary charge upon the lands, and not entitled to exoneration out of the personal estate, unless in the case of a will there shall be some “expression of an intention” to that effect, as it is defined in the English statute. In the New York statute it is required to shift this charge, that there shall be an “express direction in the will.” Those provisions extend to incumbrances created by the testator or ancestor as well as others. This question came recently before the English courts of equity, in a case⁴ where the incumbrance was the proper debt of the testator, and he had directed his executor to pay all his debts. The Vice-Chancellor, Stuart, held this a sufficient “expression of an intention” to exonerate the land. But the decree was reversed on appeal, by the Lord Chancellor, Campbell, upon the ground that such formal provisions in a will were not sufficient ground for changing the order of assets in the settlement of estates.

§ 1248 *d.* The expression of intention which shall be sufficient to control the general intendment of the law, in regard to what fund is liable to the exoneration of an incumbrance upon land devised or descended, has been variously interpreted, at different periods, and by different courts. It was at one time held that it required an express declaration to that effect.⁵ But that rule has

¹ Tweddell v. Tweddell, 2 Br. C. C. 101, 152; Butler v. Butler, 5 Vesey, 534.

² Cumberland v. Codrington, 3 Johns. Ch. 229, 257, 272.

³ 17 & 18 Vict. ch. 113; 1 New York Rev. Stats. 749.

⁴ Woolstencroft v. Woolstencroft, 6 Jur. N. S. 866.

⁵ Fereyes v. Robinson, Bunb. 301.

been since relaxed ; and it is now held that if a manifest intention to that effect appear upon the face of the will, it should have the same effect.¹ The Master of the Rolls, Sir William Grant, thus expresses the rule, in the last case : “ There is no reason whatever, either of justice or convenience, to induce me to depart from the rule laid down by Lord Thurlow, in the *Duke of Ancaster v. Mayer*,² requiring that, in order to exonerate the personal estate, there shall be either express words, or a plain indication of that intention. Indeed, I wish that the rule had been still more strict, and that nothing but express words had been permitted to alter the course and order of the law. Originally the rule was so. I find Lord Nottingham, in his manuscripts in *Popham v. Bamfield*, expresses himself thus : ‘ The law charges the debts upon the personal estate, and nothing can discharge it but exclusive and expressly negative words ; whether in the case of *hæres factus*, or *hæres natus*.’ The burden of proof is always, of course, upon the party claiming to change the order of the law.³ And this expression of intention to change the order of the law must arise from the will and not from extrinsic evidence.”⁴

§ 1248 *e*. The same rule prevails in most of the American States. A learned writer⁵ thus sums up the law upon this point : “ The weight of authority would therefore unquestionably seem to be, that the personal estate will not be primarily liable, unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own ; or has in some other way manifested an intention to throw the burden on the personalty in ease of the land.”⁶ The only cases which have attempted to vindicate a different view are limited to three States, in which, chancery law not having formed a distinct branch of judicial administration, the principles of law and equity are to some extent intermingled.⁷]

¹ *Watson v. Brickwood*, 9 Vesey, 447, 452.

² 1 Br. C. C. 454. In *Boote v. Blundell*, 1 Mer. 193, it is said, the will must contain express words for that purpose, or a clear manifested intention ; a declaration plain, or necessary inference, tantamount to express words.

³ *Wheldon v. Spode*, 15 Beavan, 539 ; *Lord v. Wightwick*, 1 Drew. 576.

⁴ *Tait v. Lord Northwick*, 4 Vesey, 816.

⁵ Judge Hare, 1 Leading Cas. in Equity ; *Duke of Ancaster v. Mayer*, 505, Am. note.

⁶ *Keyser's Estate*, 9 S. & R. 371 ; *Halsey v. Reed*, 9 Paige, 446.

⁷ *Hoff's Appeal*, 12 Harris, 200 ; *Mitchell v. Mitchell*, 3 Md. Ch. Decisions, 71 ; *Thompson v. Thompson*, 4 Ohio St. R. 333.]

§ 1249. It may be considered as a general rule, (though not as a universal rule,) that a covenant by a settler, to convey and settle lands, (not specifying any in particular,) will not constitute a specific lien on his lands; and the covenantee will be deemed a creditor by specialty only.¹ But in some cases of this sort in favor of a dowress, courts of equity have established a lien upon real property, by what has been called a very subtle equity, where, perhaps, it would be difficult to maintain it in ordinary cases. Thus, where a man before marriage gave a bond to convey sufficient freehold or copyhold estates to raise £600 per annum for his intended wife, in bar of dower; and the intended wife, by a memorandum subscribed to the bond, declared her free acceptance of the jointure in bar and satisfaction of dower; and the marriage took effect, and the husband died without having conveyed any such estates; it was decreed, that she should be deemed a specialty creditor, and entitled to be paid the arrears of her annuity out of his personal estate in the course of administration; and if that was not sufficient, then out of the real estates in the settlement of which he was tenant *in tail*, provided such deficiencies did not exceed the amount of the dower which she would have been entitled

¹ Sugden on Vendors, ch. 15, § 4, p. 633 (7th edit.); *Freemoult v. Dedire*, 1 P. Will. 429; *Finch v. Earl of Winchelsea*, 1 P. Will. 277; *Williams v. Lucas*, 1 P. Will. 430, Mr. Cox's note (1); S. C. 2 Cox, R. 160; *Berrington v. Evans* 3 Younge & Coll. 384, 392. Mr. Fonblanque says (1 Fonbl. Eq. B. 1, ch. 5, § 7, note d), that a covenant, to settle or convey particular lands, will not create at law a lien upon the land. But, in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for a valuable consideration, and without notice of such covenant. For which he cites *Finch v. Earl of Winchelsea*, 1 P. Will. 282; *Freemoult v. Dedire*, 1 P. Will. 429; *Jackson v. Jackson*, 4 Bro. Ch. R. 462 (which turned on the execution of a power), and *Coventry v. Coventry*, 2 P. Will. 222; 1 Str. R. 596; *Gilb. Eq. R.* 160; S. C. at the end of Francis's Maxims in Equity (edit. 1739). He adds in the next note (2 Fonbl. Eq. B. 1, ch. 5, § 7, note e), that a general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor; and, therefore, cannot be specifically decreed in equity. (*Freemoult v. Dedire*, 1 P. Will. 429.) But if the covenantor expressly declare the settlement to be in execution of his power over lands, though the particular land to be charged be not specified, equity will ascertain them. For which he cites *Coventry v. Coventry*, *ubi supra*. This apparent exception proceeds upon the ground that the power, being to be executed out of particular lands, is a specification, when executed, of the particular lands to be charged. But see *Ante*, § 1131, p. 483, and note (1).

to thereout, in case she had not accepted the annuity for her life.¹

§ 1250. Where the party primarily liable is entitled to indemnity from another, equity will enforce the claim directly against the party ultimately responsible, treating it as a trust. Thus, for example, if a chose in action, not negotiable at all, or not negotiable by the local law, except to create a legal right of action between the immediate debtor or indorser, and his immediate indorsee or assignee, should be passed to a remote assignee or indorsee, the latter would be entitled in equity directly to sue the party who was ultimately or circuitously liable for the debt to the antecedent holder or creditor.² Upon the same ground, if a trust is created for the benefit of a party, who is to be the ultimate receiver of the money or other thing, which constitutes the subject-matter of the trust, he may sustain a suit in equity to have the money or other thing directly paid or delivered to himself;³ for, in such a case, he is entitled to dispose of it as the absolute owner.

[* § 1251. It is upon this ground that the creditors are allowed, in equity, to go directly against legatees, or distributees, who have been paid more than their share, by mistake, and before the payment of the debts. The executor is the party primarily liable to creditors, but all others, to whom the assets have come, being also trustees for the creditors, until their claims are satisfied, are made directly responsible upon that ground; ⁴ they having no just claim upon the estate except for the residue after the payment of debts.]

§ 1252. The property of corporations is held in trust for the creditors, and may be pursued by them, into whosoever hands it may come, as well after as before the dissolution of the corporation, unless it may have come to the hands of a *bonâ fide* purchaser.⁵ Upon the like ground, the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation;

¹ *Foster v. Foster*, 3 Bro. Ch. R. 489, 493; S. C. under the name of *Tew v. Earl of Winterton*, 1 Ves. Jr. 451; Sugden on Vendors, ch. 15, § 4, p. 633, 634, (7th edit.); 1 Madd. Ch. Pr. 471, 472. See *Ante*, § 1231.

² *Riddle v. Mandeville*, 5 Cranch, 322; *Ante*, § 1087 *a*.

³ *Russel v. Clarke's Executors*, 7 Cranch, 69, 97; *McCall v. Harrison*, 1 Brock, Cir. R. 126; *Buck v. Swasey*, 35 Maine, 52; *Ante*, § 790 to 793, 1213.

⁴ *Riddle v. Mandeville*, 5 Cranch, R. 329, 330; *Ante*, § 90 to 92, and notes. *Anon.* 1 Vern. 162; *Newman v. Barton*, 2 Vern. 205; *Noel v. Robinson*, 1 Vern. 94, and Mr. Cox's note (1).

⁵ *Mumma v. The Potomac Company*, 8 Peters, R. 281, 286.

and no stockholder can entitle himself to any dividend or share of such capital stock, until all the debts are paid. And if the capital stock should be divided, leaving any debts unpaid, every stockholder, receiving his share of the capital stock, would, in equity, be held liable *pro ratâ* to contribute to the discharge of such debts out of the fund in his own hands.¹ This, however, is a remedy, which can be obtained in equity only; for a court of common law is incapable of administering any just relief; since it has no power of bringing all the proper parties before the court, or of ascertaining the full amount of the debts, the mode of contribution, the number of contributors, or the cross equities and liabilities, which may be absolutely required for a proper adjustment of the rights of all parties, as well as of the creditors.²

§ 1252 *a*. It is upon a similar principle, that the property of a corporation is held by its officers in trust, to be applied to the discharge of the legal debts of such corporation, that courts of equity have interfered to restrain such officers from applying it to any illegal purpose, and to compel restitution when any such illegal application had been made. Thus in a recent case³ in Massachusetts, it was held the courts of equity could decree against the treasurer of a town the payment into the treasury of a sum of money which he had illegally paid out, to sundry parties, for obtaining the act of incorporation.

§ 1252 *b*. But a creditor of a corporation in another State, by the laws of which State the stockholders are liable for the debts of the corporation, by reason of not having paid into the treasury of such corporation the whole amount of the capital stock, cannot maintain a suit in equity against such stockholders, in the State of Massachusetts, to enforce his debts due from the corporation against them, although some of the stockholders reside there, and the suit is brought on behalf of all the creditors.⁴

¹ Wood *v.* Dummer, 3 Mason, R. 308; Vose *v.* Grant, 16 Mass. R. 505, 517, 522; Spear *v.* Grant, 16 Mass. R. 9, 15; Curson *v.* African Company, 1 Vern. R. 121; S. C. Skinner, R. 84.

² Ibid.

³ [* Frost *v.* Belmont, 6 Allen, 152. The question of the amount of costs allowed for counsel fees, where taxed against a trust fund is here discussed by Chapman J. The rule in this State is, as here declared, to allow what would be regarded sufficient compensation for a public officer performing similar services.

⁴ Erickson *v.* Nesmith, 4 Allen, 233. But when the transaction occurs in the place of the forum a bill in equity will be the appropriate remedy. Merchants' Bank *v.* Stevenson, 5 Allen, 398.

§ 1252 c. The minority of the stockholders of a corporation may accordingly maintain a bill in equity, in behalf of themselves and the other stockholders, for a conspiracy and fraud, whereby their interests have been sacrificed, against the corporation and its officers and others participating in the acts complained of. But such bill cannot be maintained by those who have long acquiesced in the doings thus attempted to be avoided.¹ But where the officers of a manufacturing corporation have been compelled to pay corporate debts, on account of not conforming to the requirements of the statute, they cannot maintain a bill in equity for contribution against the stockholders.²

§ 1253. A case of an analogous nature is that of partnership property, on which the joint creditors, in case of insolvency, are deemed in equity to have a right of priority of payment before the private creditors of any separate partner. The joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity.³ A long series of authorities (as has been truly said) has established this equity of the joint creditors, to be worked out through the medium of the partners;⁴ that is to say, the partners have a right, *inter sese*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right except to his own share of the residue; and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners, as being the ultimate *cestuis que trust* of the fund to the extent of the joint debts. The creditors, indeed, have no lien; but they have something approaching to a lien, that is, they have a right to sue at law, and, by judgment and execution, to obtain possession of the property;⁵ and, in equity, they have a right to follow it, as a trust, into the possession of all persons who

¹ Peabody v. Flint, 6 Allen, 52.

² Stone v. Fenno, 6 Allen, 579.]

³ *Ante*, § 675, 1207, 1243.

⁴ Campbell v. Mullett, 2 Swanst. R. 574; West v. Skip, 1 Ves. 237, 455; *Ex parte* Ruffin, 6 Ves. 126 to 128; Wood v. Dummer, 3 Mason, R. 312, 313; Murray v. Murray, 5 Johns. Ch. R. 60; Taylor v. Fields, 4 Ves. 396; Young v. Keighley, 15 Ves. 557; *Ante*, § 675, 1207, 1243.

⁵ *Ibid.*; *Ex parte* Ruffin, 6 Ves. 126 to 128; *Ex parte* Williams, 11 Ves. 3, 5, 6; *Ex parte* Kendall, 17 Ves. 521, 526. [And until the joint creditors have obtained an execution, and thereby a lien upon the partnership property, it has been said that they can sustain no bill to enjoin a creditor of one partner from levying on partnership property. Young v. Frier, 1 Stockton, Ch. R. 465.]

have not a superior title. But, in the mean time, the creditors cannot prevent the partners from transferring it by a *bond fide* alienation.¹

[* § 1253 *a*. The extent of a banker's lien upon securities left with him for special purposes, but in some sense connected with his general business, is one not always easy of determination. The question is very elaborately discussed in an important case,² which arose in the King's Bench and went through all the higher courts in Westminster Hall, the Exchequer Chamber reversing, and the House of Lords affirming, the judgment of the King's Bench. That was a case where the customer kept exchequer bills, locked up in a box, and placed in the bank, of which the officers had the key. Being obliged, from time to time, to have the bills exchanged for others of a like kind, he handed them over to the bankers for that purpose merely, this being so understood by the bankers. The Court of King's Bench decided against the lien, the Exchequer Chamber in favor of it. The House of Lords regarded this exchange of the bills as a special agency, and as giving no control over the bills, for any other purpose, after that was accomplished; that in performing this agency they stood in much the same relation to the owner as that of a messenger employed to procure the exchange; and that no lien for the general balance of account attached. But where Dutch bonds were deposited with a broker to cover an advance, the broker having power to sell the bonds when the advance became payable, it was held that the broker had a general lien upon them for the balance of his account.³

§ 1254. We now proceed to consider such implied or constructive trusts, as arise by implication of law merely.]

§ 1255. One of the most common cases in which a court of equity acts upon the ground of implied trusts *in invitum*, is, where a party has received money which he cannot conscientiously withhold from another party.⁴ It has been well remarked that the receiving of money, which consistently with conscience cannot be retained, is in equity sufficient to raise a trust in favor of the

¹ *Ante*, § 675.

² [* *Brandao v. Barnett*, 12 Cl. & Fin. 787. See also *Davis v. Bowsher*, 5 T. R. 488.

³ *Jones v. Peppercorne*, 5 Jur. N. S. 140.]

⁴ Com. Dig. *Chantry*, 2 A. 1; Id. 4 W. 5.

party, for whom, or on whose account it was received.¹ This is the governing principle in all such cases. And, therefore, whenever any interest arises, the true question is, not whether money has been received by a party, of which he could not have compelled the payment, but whether he can now, with a safe conscience, *ex æquo et bono*, retain it.² Illustrations of this doctrine are familiar in cases of money paid by accident, or mistake, or fraud. And the difference between the payment of money under a mistake of fact, and a payment under a mistake of law, in its operation upon the conscience of the party, presents the equitable qualifications of the doctrine in a striking manner.³

§ 1256. It is true that courts of law now entertain jurisdiction in many cases of this sort, where formerly the remedy was solely in equity; as, for example, in an action of assumpsit for money had and received, where the money cannot conscientiously be withheld by the party,⁴ following out the rule of the civil law: *Quod conductio indebiti non datur ultra, quam locupletior factus est, qui accepit.*⁵ But this does not oust the general jurisdiction of courts of equity over the subject-matter, which had for many ages before been in full exercise, although it renders a resort to them for relief less common as well as less necessary than it formerly was.⁶ Still, however, there are many cases of this sort where it is indispensable to resort to courts of equity for adequate relief, and especially where the transactions are complicated, and a discovery from the defendant is requisite.⁷

§ 1257. Where a party purchases trust property, knowing it to be such, from the trustee, in violation of the objects of the trust, courts of equity force the trust upon the conscience of the guilty party, and compel him to perform it, and to hold the property subject to it, in the same manner as the trustee himself held it.⁸ It

¹ 2 Fonbl. Eq. B. 2, ch. 1, § 1, note (b).

² Ibid.

³ Ibid.; *Ante*, § 111, 140 to 142.

⁴ *Farmer v. Arundel*, 2 W. Black. R. 824; *Moses v. Macferland*, 2 Burr. 1012; *Bize v. Dickason*, 1 Term, R. 185; *Bilbie v. Lumley*, 2 East, R. 469.

⁵ Burr. 1011. See also Dig. Lib.*12, tit. 6, *passim*.

⁶ *Ante*, § 60.

⁷ 2 Fonbl. Eq. B. 2, ch. 1, § 1, note (b); *Ante*, § 110 to 116, 140 to 151.

⁸ *Ante*, § 395 to 405; 4 Kent, Comm. Lect. 60 (4th edit.). See also 2 Fonbl. Eq. B. 2, ch. 6, § 1, note (a); Id. § 2, note (h). See also *Powell v. Monson*, and *Brimfield Manuf. Co. v. Mason*, R. 347; Com. Dig. *Chancery*, 4 W. 28; 2 Madd. Ch. Pr. 103, 104; *Jeremy on Eq. Jurisd.* B. 2, ch. 3, p. 281, 282; *Ante*, § 395;

has been truly said by an eminent judge, that the only thing to be inquired of in a court of equity, in cases of this sort is, whether the property, bound by the trust, has come into the hands of persons, who were either compellable to execute the trust, or to preserve the property for the persons entitled to it.¹ It is upon this ground that persons, colluding with the executor or administrator in a known misapplication of the assets of the estate, are made responsible for the property in their hands; for they are treated as purchasers with notice, and thus as mere trustees of the parties, who are entitled to the assets, the latter being a trust fund under the administration of the executor or administrator.²

§ 1258. Upon similar principles, wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the original owner, or *cestui que trust*.³ The general proposition, which is maintained both at law and in equity upon this subject, is, that if any property, in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right, (not being *bonâ fide* purchasers for a valuable consideration without notice,) any more valid claim in respect to it, than they respectively had before such change. An abuse of a trust can confer no rights on the party abusing it, or on those who claim in privity with him.⁴

Adair v. Shaw, 1 Sch. & Lefr. 243, 262; *Mechanics' Bank of Alexandria v. Seton*, 1 Peters, R. 309; *Wilson v. Mason*, 1 Cranch, R. 100; *Russell v. Clark's Ex'rs*, 7 Cranch, R. 69, 97; *Murray v. Ballou*, 1 Johns. Ch. R. 566.

¹ Lord Redesdale, in *Adair v. Shaw*, 1 Sch. & Lefr. 262. See also *Leigh v. Macauley*, 1 Younge & Coll. 265, 266.

² *Ante*, § 422, 423; *Hill v. Simpson*, 7 Ves. 166.

³ *A fortiori*, if the property has been rightfully sold by an agent or trustee, if the proceeds of the sale can be distinctly and separately traced, the property belongs in equity, and often in law, to the principal. Thus, for example, if a factor sells goods consigned to him for sale, and takes notes for the purchase-money, those notes, if he fails, will belong to his principal, and not to his own assignees or representatives. *Ex parte Dumas*, 1 Atk. 232, 233; *Scott v. Surman*, Willes, R. 400; *Thompson v. Perkins*, 3 Mason, R. 232; *Burdett v. Willett*, 2 Vern. R. 638; *Grigg v. Cocks*, 4 Simons, R. 438; *Ante*, § 1232; *Wilkins v. Stearns*, 1 Younge & Coll. New R. 431.

⁴ *Taylor v. Plumer*, 3 M. & Selw. 574 to 576. The judgment of Lord Ellenborough in this case is very masterly, and deserves an attentive perusal. Conrad

This principle is fully recognized at law in all cases, where it is susceptible of being brought out as a ground of action, or of defence, in a suit at law. In courts of equity it is adopted with a universality of application.¹

§ 1259. Thus, for instance, if A. is trusted by B. with money to purchase a horse for him, and A. purchases a carriage with that money, in violation of the trust, B. is entitled to the carriage, and may, if he chooses so to do, sue for it at law.² So, if A. intrusts money with a broker, to buy Bank of England stock for him and he invests the money in American stocks, A. is entitled to, and may maintain an action at law for those stocks, in whosoever hands he finds them, not being a purchaser for a valuable consideration without notice.³ It matters not in the slightest degree, into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the product of a substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail, which, of course, is the case when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description.⁴

§ 1260. Cases may readily be put, where this doctrine would be enforced in equity under circumstances in which it could not be applied at law. Thus, for instance, if a trustee, in violation of his duty, should lay out the trust money in land, and take a conveyance in his own name, the *cestui que trust* would be without any relief at law. But a court of equity would hold the *cestui que trust* to be the equitable owner of the land, and would decree it to him accordingly; not upon any notion of his having ratified the act, but upon the mere ground of a wrongful conversion, creating, *in foro conscientie*, a trust in his favor.⁵

v. Atlantic Insur. Co. 1 Peters (S. C.) R. 448; *Oliver, &c. v. Piatt*, 3 How. Sup. Ct. R. 333.

¹ *Ibid.*; *Hassal v. Smithers*, 12 Ves. 119; 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (c); *Murray v. Lylburn*, 2 Johns. Ch. R. 441; *Lewin on Trustees*, ch. 11, § 2, p. 201 to 204.

² *Ibid.*; *Taylor v. Plumer*, 3 Maule & Selw. 574, 575, 576.

³ *Ibid.*; See *Ord v. Noel*, 5 Madd. R. 408; *Com. Dig. Chancery*, 4 W. 29.

⁴ *Ibid.*; *Copeman v. Gallant*, 1 P. Will. 319, 320; *Ryall v. Rolle*, 1 Atk. 172; *Leigh v. Macauley*, 1 Younge & Coll. 260, 265.

⁵ *Lane v. Dighton, Ambler*, R. 409, 411, 413; 3 M. & Selw. 579; *Lench v.*

§ 1261. Upon similar grounds, where a trustee, or other person, standing in a fiduciary relation, makes a profit out of any transactions within the scope of his agency or authority, that profit will belong to his *cestui que trust*; for it is a constructive fraud upon the latter, to employ that property contrary to the trust, and to retain the profit of such misapplication; and, by operation of equity, the profit is immediately converted into a constructive trust in favor of the party entitled to the benefit.¹ For the like reason a trustee, becoming a purchaser of the estate of his *cestui que trust*, is deemed incapable of holding it to his own use; and it may be set aside by the *cestui que trust*.² Nor is the doctrine confined to trustees, strictly so called. It extends to all other persons standing in a fiduciary relation to the party, whatever that relation may be.³

[*1261 *a*. The produce of a specific legacy being traced into post-obit securities, given by the party to whom the avails of the legacy had just gone, after it left the hands of the administrator, the court held that the *cestui que trust* was entitled to a charge on the securities.⁴ The facts of the case were, that a specific legacy of £ 6,000 consols, bequeathed to the plaintiffs, was unnecessarily and improperly sold out by the administrator, with the concurrence of another party, and the proceeds carried partly to the banking account of the administrator and partly to that of the other party. A series of shuffling of checks and transfer of moneys took place; but £ 2,908 was traced to the other party. About this time this party laid out moneys in the purchase of post-obit securities; and though the trust-moneys could not be distinctly traced into the securities, yet the court held, from the suspicious character of the transactions, that such was the just inference, so

Lench, 10 Ves. 511, 517; *Boyd v. McLean*, 1 Johns. Ch. R. 582; *Lewis v. Madocks*, 17 Ves. 57, 58; *Phayre v. Peree*, 3 Dow, R. 116; *Sugden on Vendors*, ch. 15, § 3, p. 628 (7th edit.); *Liebman v. Harcourt*, 2 Meriv. R. 513; *Murray v. Lylburn*, 2 Johns. Ch. R. 442, 443.

¹ *Fawcett v. Whitehouse*, 1 Russ. & Mylne, 132, 149; *Ante*, § 321; *Com. Dig. Chancery*, 4 W. 30; *Giddings v. Eastman*, 5 Paige, R. 501.

² *Ante*, § 321, 322; *Giddings v. Eastman*, 5 Paige, R. 561.

³ *Ante*, § 315 to 328; *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 3, p. 141 to 149; *Wormley v. Wormley*, 8 Wheat. R. 421, 438; *Bulkley v. Wilford*, 2 Clark & Finnel. R. 177; *Brown v. Lynch*, 1 Paige, R. 147; *Fellows v. Fellows*, 4 Cowen, R. 682; *Giddings v. Eastman*, 5 Paige, R. 561.

⁴ [**Harford v. Lloyd*, 20 Beavan, 310. See also *Ernest v. Croysdill*, 6 Jur. N. S. 740.

far as to throw on the other side the onus of disproving it; and this not being done, the court enforced the lien for that sum. It appeared that the securities had been sold and transferred to a third party, in consideration of a debt then owing. But it appearing also that he had notice that the money, by which the securities had been obtained, came from the trustee, though he had no notice of the breach of trust, it was considered that he could not set up an adverse title against the trustee, and much less against the *cestui que trust*.

§ 1261 b. This subject of making one trustee for money misapplied, is very extensively discussed, and made to operate very equitably, under a peculiar state of facts, where the agent of a manufacturing corporation, without the knowledge of the directors, had contracted with a capitalist for the advance of large sums of money, from time to time, the contract being beyond the scope of his authority. This money had been put into the business of the company, in the purchase of wool and other materials for manufacture, and had thus become incapable of clear identification. It was held, that if the corporation, after becoming aware of the facts, claimed to retain the funds, they thereby ratified the act of their agent, *in toto*, and were bound to account for the money in the manner stipulated by the agent, and thus give the plaintiffs a lien for their advances upon the cloths manufactured. But if the corporation, upon discovering the terms of the contract of their agent, repudiated it, and the avails of the money, so far as practicable, then the act of the agent, in putting the money into the business of the company, was a misapplication of the money, and the plaintiffs may reclaim them, into whatever hands they came, or in whatever form they existed, until after a *bonâ fide* sale without notice.¹ Where a purchaser is compelled by a court of equity to relinquish his purchase, in favor of the *cestui que trust*, on the ground that the vendor committed a breach of trust in the sale, the purchaser is entitled to all the assistance which the court or the *cestui que trust* can give him, to recover from the fraudulent trustee the purchase-money still in his hands.²

§ 1261 c. There is no rule of equity law applicable to trusts which is more uniformly acted upon by the courts than that one who assumes to act in relation to trust property, without just

¹ Whitwell v. Warner, 20 Vt. R. 425.

² Hope v. Liddell, Liddell v. Norton, 21 Beavan, 183.

authority, however *bonâ fide* may be his conduct, shall be held responsible both for the capital and the income, to the same extent as if he had been *de jure* trustee.¹ Thus, where the estate of tenant for life was liable to forfeiture upon his mortgaging the same, and he executed a mortgage to one without the knowledge of those taking under the forfeiture, it was held that such mortgagee was responsible to those entitled under the forfeiture, from the filing of the bill, at all events, and, beyond that, from the time he had notice of the trusts creating the forfeiture.² This principle is very broadly asserted in a very recent case³ in the Court of Chancery, where the trustee had wrongfully put the trust-money to the payment of his own debt, with the knowledge of the trust on the part of his creditor. The latter was decreed to refund the money to the *cestui que trust*, after the lapse of twenty years.

§ 1261 *d.* And the principle of following trust funds in the hands of a defaulting trustee, applies against the assignees of such trustee as fully as against the trustee himself; and the evidence that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other money, was held not to raise any equity in favor of the assignees or general creditors, as against the owners of the trust fund.⁴]

§ 1262. In cases of this sort, the *cestui que trust* (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property; or he may disclaim any title thereto, and proceed upon any other remedies, to which he is entitled, either *in rem* or *in personam*.⁵ The substituted fund is only liable to his option.⁶ But he cannot insist upon opposite and repugnant rights. Thus, for example, if a trustee of land has sold the land, in violation of his trust, the beneficiary cannot insist upon having the land, and also the notes given for the purchase-money; for, by taking the latter, at least, so far as respects the purchaser, he must be deemed to affirm the sale. On the other hand, by following his title in the land, he repudiates the sale.⁷

¹ Hennessey v. Bray, 33 Beav. 96.

² Ibid.

³ Rolfe v. Gregory, 11 Jur. N. S. 98.

⁴ Frith v. Cartland, 2 H. & M. 417; 11 Jur. N. S. 238.]

⁵ Docker v. Somes, 2 Mylne & Keen, 655.

⁶ Watts v. Girdlestone, 6 Beavan, R. 188, 190, 191; Post, § 1273 *a.*

⁷ Murray v. Lylburn, 2 Johns. Ch. R. 441, 442, 444, 445; Murray v. Ballou, 1 Johns. Ch. R. 581.

§ 1263. So, where an executor or trustee, instead of executing any trust, as he ought, as by laying out the property, either in well-secured real estates, or in government securities, takes upon himself to dispose of it in another manner; or where, being intrusted with stock, he sells it in violation of his trust; in every such case, the parties beneficially entitled have an option to make him replace the stock or other property; or if it is for their benefit, to affirm his conduct, and take what he has sold it for with interest, or what he has invested it in; and, if he has made more, they may charge him with that also.¹ But they cannot insist upon repugnant claims; such as, for instance, in the case of a sale of stock, to have the stock replaced, and to have interest, (instead of the dividends,) or to take the money, and have the dividends, as if it had remained stock.²

§ 1264. Wherever a trustee is guilty of a breach of trust, by the sale of the trust property to a *bonâ fide* purchaser, for a valuable consideration, without notice, the trust in the property is extinguished.³ But if afterwards he should repurchase, or otherwise become entitled to the same property, the trust would revive, and reattach to it in his hands; for it will not be tolerated in equity, that a party shall, by his own wrongful act, acquire an absolute title to that which he is in conscience bound to preserve for another. In equity, even more strongly than at law, the maxim prevails, that no man shall take advantage of his own wrong.⁴ Even at law, if a disseisor aliens the land, and descent is cast, and afterwards the disseisor reacquires the land by descent or purchase, the disseisee may re-enter, although, otherwise the mesne descent cast would have barred his entry.⁵

§ 1265. The truth is, that courts of equity, in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehensive, in the application of their re-

¹ Pocock v. Reddington, 5 Ves. 800; Harrison v. Harrison, 2 Atk. 121; Bostock v. Blakeney, 2 Bro. Ch. R. 653; Forrest v. Elwes, 4 Ves. 497; Earl Powlet v. Herbert, 1 Ves. Jr. 297; Byrchell v. Bradford, 6 Madd. 235.

² Ibid., and Long v. Stewart, 5 Ves. 800, note (a); Crackelt v. Bethune, 1 J. & Walk. 586.

³ This proposition must be taken with the qualifications, that the purchase-money has been paid.

⁴ 2 Fonbl. Eq. B. 2, ch. 5, § 5, and note (p); Bovey v. Smith, 2 Ch. Cas. 124; S. C. 1 Vern. R. 84; Com. Dig. Chancery, 4 W. 25.

⁵ Ibid., and Litt. § 395; Co. Litt. 242 a.

medial justice; and, especially, where there is any fraud touching property, they will interfere, and administer a wholesome justice, and, sometimes, even a stern justice, in favor of innocent persons, who are sufferers by it, without any fault on their own side. This is often done, by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien.¹ Thus a fraudulent purchaser will be held a mere trustee for the honest, but defrauded and cheated vendor.² A person, who has fraudulently procured a fine to be levied in his favor by an idiot or lunatic, will be held a trustee for the benefit of the persons who are prejudiced by the fraud.³ A person who lies by, and without notice suffers his own estate to be sold and incumbered in favor of an innocent purchaser or lender, will be held a trustee of the estate for the latter.⁴ An heir, preventing a charge or devise of an estate to another, by a promise to perform the same personally, will be held a trustee for the latter, to the amount of the charge, or beneficial interest intended.⁵ An agent, authorized to purchase an estate for another, who purchases the same for himself, will be held a trustee of his principal.⁶ But it is unnecessary to pursue this subject further, as many illustrations of a like nature have been already given under the heads of actual fraud, and constructive fraud.⁷

§ 1266. We shall now consider the nature and extent of the responsibility of trustees, and the remedies which may be resorted to, to enforce a due performance of trusts. [* The Supreme Judicial Court in Massachusetts held, that a bill in equity will not lie merely for the purpose of declaring a trust, even when the defendant denies it. But if he is about to leave the country, the trust may be declared and the bill retained for further direction.⁸]

§ 1267. It is not easy, in a great variety of cases, to say what the precise duty of a trustee is; and, therefore, it often becomes indispensable for him, before he acts, to seek the aid and direc-

¹ See 1 Fonbl. Eq. B. 1, ch. 2, § 2, note (k).

² *Ante*, § 191, 204, 218, 228, 229, 238, 239, 244, 251, 254, 313, 315, 334.

³ 1 Fonbl. Eq. B. 1, ch. 2, § 2, note (k).

⁴ *Ante*, § 384 to 390.

⁵ *Ante*, § 252, 256, 382, 768.

⁶ *Ante*, § 316.

⁷ *Ante*, § 395 to 412, 437 to 439.

⁸ [* *Baylies v. Payson*, 5 Allen, 473.]

tion of a court of equity. We have already seen, that his acts done to the prejudice of the *cestui que trust* (or beneficiary) are sometimes such as are binding, and cannot be recalled; and sometimes are such as a court of equity will not punish, by treating them as breaches of trust.¹ But the cases in which such acts will be deemed violations of trust, for which a trustee will be held responsible in equity, are difficult to be defined. It has been often said, that, what he may be compelled to do by a suit, he may voluntarily do without a suit. But this (as we have also seen) is a doctrine requiring many qualifications, and, by no means, to be generally relied on for safety.²

§ 1268. In a general sense, a trustee is bound by his implied obligation to perform all those acts which are necessary and proper for the due execution of the trust, which he has undertaken.³ But, as he is supposed merely to take upon himself the trust, as a matter of honor, conscience, friendship, or humanity, and, as he is not entitled to any compensation for his services, at least not without some express or implied stipulation for that purpose;⁴ he

¹ *Ante*, § 977 to 979, 995, 997.

² *Ante*, § 979; 2 Fonbl. Eq. B. 2, ch. 7, § 2, and note (c).

³ Com. Dig. *Chancery*, 4 W. 25; *Fyler v. Fyler*, 3 Beavan, R. 550.

⁴ 2 Fonbl. Eq. B. 2, ch. 7, § 3; *Manning v. Manning*, 1 Johns. Ch. R. 527, 532 to 535. *Arnold v. Garner*, 2 Phillips, Ch. R. 231. The same rule, refusing compensation to trustees, and to others standing in similar relations, is found in the Roman law, and was probably thence transferred into equity jurisprudence. Mr. Chancellor Kent has elaborately defended it, in his opinion, in the case of *Manning v. Manning*, 1 Johns. Ch. R. 534, from which the following extract is made: "Nor does the rule strike me as so very unjust, or singular and extraordinary; for the acceptance of every trust is voluntary and confidential; and a thousand duties are required of individuals, in relation to the concerns of others, and, particularly, in respect to numerous institutions, partly of a private and partly of a public nature, in which a just indemnity is all that is expected and granted. I should think it could not have a very favorable influence on the prudence and diligence of a trustee, were we to promote, by the hopes of reward, a competition, or even a desire, for the possession of private trusts, that relate to the moneyed concerns of the helpless and infirm. To allow wages or commissions for every alleged service, how could we prevent abuse? The infant or the lunatic cannot watch their own interest. *Quis custodiet ipsos custodes?* The rule in question has a sanction in the wisdom of the Roman law, which, equally with ours, refused a compensation, and granted an indemnity to the trustee of the minor's estate. The maxim in that law was, that *Lucrum facere ex pupilli tutela tutor non debet*. And the tutor or curator was entitled only to his reasonable and just expenses, incurred in behalf of the estate, such as travelling charges, costs of suit, &c., unless a certain allowance was granted by the person, by whom he was appointed.

would seem, upon the analogous principles applicable to bailments, bound only to good faith and reasonable diligence; and, as in case

Sumptuum qui bonâ fide in tutelam, non qui in ipsos tutores fiunt, ratio haberi solet; nisi ab eo, qui eum dat, certum salarium ei constitutum est. Item, *sumptus litis tutor reputabit, et viatica, si ex officio necesse habuit aliquo excurrere vel proficisci.* (Dig. 26, tit. 7, l. 33; Idem. 26, tit. 7, l. 58; Idem. 27, tit. 3, l. 1, 9.) It is probable, that this same principle, which we find in some, has been infused into the municipal law of most of the nations of Europe; because most of them have adopted the civil law. (Domat, B. 2, tit. *Tutors*, tit. 2, § 3, art. 5, 35; Ersk. Inst. B. 1, tit. 7, § 31, 32.) The same rule was known in the early age of the common law, and applied to the guardian in socage. He was entitled only to his allowance for his reasonable costs and expenses, when called to render an account of the guardianship of the estate of the ward. (Litt. § 123.) And this was the provision in the statute of Marlbridge (52 H. III. ch. 17), declaring the duties of the guardian in socage, *Salvis ipsis custodibus rationabilibus misis suis.*" The rule has been also applauded by great equity judges in England in modern times. Lord Cottenham, in *Home v. Pringle*, 8 Clark & Fin. 264, 287, expressed a strong approval of the rule; and said in the case where a trustee had been appointed cashier to the trustees: "This is the real question, because it is not necessary to hold that the appointment is illegal in order to maintain the principle that the party who, having accepted the office of trustee, which, unless otherwise provided for by the trust, must be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust property in respect of such employment. That the office of trustee, and of factor or cashier to the property are inconsistent, cannot be disputed. If the execution of the trust requires such appointment, it becomes the duty of the trustee to exercise his discretion and judgment in the selection of the officers, and his vigilant superintendence of their proceedings when appointed; all which is lost the trust, when a trustee is appointed to the execution of those duties; therefore, the courts of equity in England, in such cases, refuse to the trustee any remuneration which would come to others from the appointment; which produces the salutary effect of deterring trustees from making such appointments when not actually required, and when such necessity exists, preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule as acted upon in England is not disputed; and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland." I confess that I have not been able quite so clearly to see, or so strongly to approve, the policy of the rule. Trusts may be very properly considered as matters of honor and kindness, and of a conscientious desire to fulfil the wishes and objects of friends and relatives. But the duties and responsibilities of the office of a trustee are sufficiently onerous and perplexing in themselves; and mistakes, even of the most innocent nature, are sometimes visited with severe consequences. Nor can any one reasonably expect any trustee to devote his time or services to a very watchful care of the interests of others, when there is no remuneration for his services; and there must often be a positive loss to

of a gratuitous bailee, liable only for gross negligence.¹ It would be difficult, however, to affirm, that courts of equity do, in fact, always limit the responsibility of trustees, or measure their acts, by such a rule.²

[*§ 1268 *a.* Trustees and others standing in similar relations have more commonly been allowed reasonable compensation for their services, in the American courts of equity, as already intimated. And in the English equity courts that practice is becoming more common, and although it is there treated as an exception to the general rule, we think the true exposition of the matter makes the rule the same, both in this country and in England. Compensation is allowed, in both countries, when from the circumstances attending the case, it is evident the parties expected such compensation would be made. It was accordingly allowed where the testator appointed, as trustee and executor, a person who for many years had been the paid receiver and manager of his estate, and the tenant for life was an infant.³

§ 1268 *b.* The more recent decisions in regard to the extent of the responsibility of agents, bailees, and all similar trustees, seem to make the question turn more upon the nature of the trust than the fact of it being gratuitous or for compensation. We should not be prepared, at the present time, to give much countenance to the idea that a trustee of an estate, either real or personal, who has the entire management entrusted to him, or even a general supervision, for the benefit of those interested, is only liable for gross himself, in withdrawing from his own concerns some of his own valuable time. To say that no one is obliged to take upon himself the duty of a trustee, is to evade and not to answer the objection. The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interest, to accept the office; and to take away the temptation to abuse the trust, for mere selfish purposes, as the only indemnity for services of an important and anxious nature. The very circumstance, that trustees now often stipulate for a compensation before accepting the office, and that courts of equity now sanction such an allowance, is a distinct proof that the rule does not work well, and is felt to be inconvenient or unreasonable in practice. The rule to disallow compensation to trustees has not been generally adopted in America. See *Meacham v. Sterne*, 9 Paige, 399; *Barrel v. Joy*, 16 Mass. R. 22; *Dewey v. Allen*, 1 Pick. 147.

¹ Story on Bailments, § 173, 174; 2 Fonbl. Eq. B. 2, ch. 7, § 4, note (*i*). See also Dig. Lib. 26, tit. 7, l. 7, § 2.

² See *Short v. Waller*, 9 Beavan, R. 497.

³ [**Newport v. Bury*, 23 Beavan, 30. See also *Marshall v. Halloway*, 2 Swanst. 452, 453; *Ex parte Fermor*, Jacob. 404, 406; *Warbass v. Armstrong*, 2 Stockton, Ch. R. 263.

negligence.¹ But where a solicitor was appointed executor, with liberty to charge for his professional services, he was held not to be entitled to charge for services which appertained to the ordinary duties of an executor.² But whether the service be gratuitous or not, the duty of the trustee undoubtedly is to perform it, according to his best ability, with such care and diligence as men, fit to be entrusted with such matters, may fairly be expected to put forth in their own business of equal importance.^{3]}

§ 1269. In respect to the preservation and care of trust property, it has been said that a trustee is to keep it as he keeps his own. And, therefore, if he is robbed of money, belonging to his *cestui que trust*, without his own default or negligence, (or, perhaps, strictly speaking, without his own gross default or negligence,)⁴ he will not be chargeable. He is even allowed in equity to establish, by his own oath, the amount so lost; for he cannot possibly, in ordinary cases, have any other proof.⁵ So, if he should deposit the money with a banker in good credit, to remit it to the proper place by a bill, drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible.⁶ The rule, in all cases of this sort, is, that, where a trustee acts by other hands, either from necessity, or conformably to the common usage of mankind, he is not to be made answerable for losses.⁷

¹ Briggs v. Taylor, 28 Vt. R. 180; *Ante*, § 400 a.

² Harbin v. Darby, 6 Jurist, N. S. 906.

³ *Post*, § 1272, 1273.]

⁴ Story on Bailments, § 174, 183.

⁵ Morley v. Morley, 2 Ch. Cas. 2; Knight v. Lord Plymouth, 3 Atk. 480; S. C.

1 Dick. R. 120, 127; Jones v. Lewis, 2 Ves. 240; 2 Fonbl. Eq. B. 2, ch. 7, § 4.

⁶ Knight v. Lord Plymouth, 3 Atk. 480; Jones v. Lewis, 2 Ves. 240, 241; Rowth v. Howell, 3 Ves. 564; Massey v. Banner, 4 Madd. R. 416, 417; *Ex parte Belchier & Parsons*, Ambl. R. 219, and Mr. Blunt's note (4); Adams v. Claxton, 6 Ves. 226; 2 Fonbl. Eq. B. 2, ch. 7, § 4.

⁷ *Ex parte Belchier v. Parsons*, Ambl. R. 219. The same rule applies here as in cases of personal representatives of a deceased party, who are treated as trustees. In Clough v. Bond, 3 Mylne & Craig, 490, 496, Lord Cottenham, speaking on this subject, said: "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund, in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon

[* § 1269 *a*. The English courts of equity sanction the investment of trust funds under their control, in the public securities of the kingdom in bank stock, East India stock, exchequer bills, and in annuities, as well as upon mortgage securities upon real estate, in England or Wales.¹ And it is intimated by Lord Chancellor Campbell, in the Court of Chancery Appeal, the Lords Justices hesitating, that if the trustee invest trust funds in securities such as the court might not have approved or advised, if application had been made for that purpose in advance, he will not necessarily be regarded as guilty of a breach of trust.² And where the fund is not in court, and the trustees act *bonâ fide*, and to the best of their discretion, they are entitled to the protection of the court.³ But the English courts manifest a preference for mortgage securi-

securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable; *Phillips v. Phillips* (2 Freem. Ch. Ca. 11); or if he leave money due upon personal security, which, though good at the time, afterwards fails. *Powell v. Evans* (5 Ves. 839); *Tebbs v. Carpenter* (1 Madd. 290). And the case is stronger, if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus, he is not liable upon a proper investment in the three per cents, for a loss occasioned by the fluctuations of that fund; *Peat v. Crane* (2 Dick. 499, note), but he is for the fluctuations of any unauthorized fund; *Hancock v. Allen* (2 Dick. 498); *Howe v. Earl of Dartmouth* (7 Ves. 137). [See farther on this subject, *Band v. Fardell*, 35 Eng. Law & Eq. R. 228; *Robinson v. Robinson*, 9 Id. 69; *Roby v. Ridehalgh*, 31 Id. 459; *Bate v. Hooper*, 35 Id. 160.] So, when the loss arises from the dishonesty or failure of any one, to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator. *Langford v. Gascoyne* (11 Ves. 333); *Lord Shipbrook v. Lord Hinchinbrook* (11 Ves. 252; 16 Ves. 477); *Underwood v. Stevens* (1 Mer. 712); and see *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 Younge & Coll. New R. 16, 28.

¹ [* 7 Jur. N. S. Pt. 2, 58; *Equitable Insurance Co. v. Fuller*, Johns. & H. 379; S. C. 7 Jur. N. S. 307; *Cohen v. Waley*, 7 Jur. N. S. 937; *Langford in re*, 2 Johns. & H. 458; *Hard v. Hard*, 11 W. R. 50.

² *Colne Valley v. Halstead Company in re*, 1 De G. F. & J. 53.

³ *Cockburn v. Peel*, 7 Jur. N. S. 810.

ties over East India stock.¹ But investment in railway shares is not favored.^{2]}

§ 1270. In all cases, however, in which a trustee places money in the hands of a banker, he should take care to keep it separate, and not mix it with his own in a common account; for, if he should so mix it, he would be deemed to have treated the whole as his own; and he would be held liable to the *cestui que trust* for any loss sustained by the banker's insolvency.³

[* § 1270 *a*. The question of the loss of trust funds by means of the failure of bankers is a constant source of controversy in the English courts of equity. If the investment is made with a banker, in a manner not authorized by the will, the trustee will be held responsible.⁴ But as a general thing it is said there is no impropriety in the temporary investment of trust-money on a deposit note.⁵

§ 1270 *b*. In one case the testator directed that all of his residuary estate, not in money or government securities, should by his trustees be converted into money and retained, until favorable opportunities to invest the same in land, in Ireland, the income of which he directed paid successively to parties named. The income of the fund until invested in land was to be paid to the same persons entitled to receive it after the permanent investment. At the time of the testator's decease there were investments in English and Irish bank stock, and in East India stock, and upon a special case, for the direction of the court, the trustees were held to be justified in retaining the English and Irish bank stock and East India stock, by way of interim investment until proper purchases of land could be made.⁶ But we apprehend that if a trustee, without necessity or the sanction of a court of equity, assumes the responsibility of departing from the directions of the will, he is liable to make good any loss in consequence.]

§ 1271. In respect to the manner of managing funds, and lay-

¹ *Ungless v. Tuff*, 30 Law J. ch. 784.

² *Harris v. Harris*, 29 Beav. 107. This was where the order was for investment in the funds of any company incorporated by act of Parliament, and it was held not to warrant an investment in preference railway shares.]

³ *Massey v. Banner*, 4 Madd. Ch. R. 416, 417; *Freeman v. Fairlie*, 3 Meriv. R. 29; *Clarke v. Tipping*, 9 Beavan, R. 284.

⁴ [* *Rehden v. Wesley*, 29 Beav. 213.

⁵ *Wilkins v. Hogg*, 8 Jur. N. S. 25.

⁶ *Hume v. Richardson*, 8 Jur. N. S. 686.]

ing out money on securities, and even in respect to allowing trust money to remain in the hands of debtors, considerable strictness is required by the rules of courts of equity. It has been remarked by Lord Hardwicke, that these rules should not be laid down with a strictness to strike terror into mankind, acting for the benefit of others, and not for their own ;¹ and that, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to loss, which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office.²

§ 1272. There is manifest good sense in these remarks. But it would be difficult to affirm that the rules of courts of equity have always proceeded upon so broad and liberal a basis. The true result of the considerations here suggested would seem to be, that, where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property.³ On the contrary, courts of equity have laid down some artificial rules for the exercise of the discretion of trustees, which import (to say the least) extraordinary diligence and vigilance in the management of the trust property.

§ 1273. Thus if a trustee should lay out trust funds in any stock in which a court of equity itself is not in the habit of directing funds in its own possession to be laid out, although there should be no *mala fides* ; yet, if the stock should fall in value, he would be held responsible for the loss.⁴ In other words, a court

¹ *Ex parte Belchier & Parsons*, Ambler, R. 219 ; 2 Madd. Ch. Pr. 1142.

² *Knight v. Earl of Plymouth*, 1 Dick. R. 126, 127 ; S. C. 3 Atk. 480 ; 2 Madd. Ch. Pr. 114 ; *Powell v. Evans*, 5 Ves. 843 ; *Thompson v. Brown*, 4 Johns. Ch. R. 629. .

³ See *Hart v. Ten Eyck*, 2 Johns. Ch. R. 76 ; *Thompson v. Brown*, 4 Johns. Ch. R. 619, 620.

⁴ *Hancom v. Allen*, 2 Dick. 498 ; *Trafford v. Boehm*, 3 Atk. 444 ; *Adye v. Feuillateau*, 2 Dick. R. 499, note ; S. C. 1 Cox, 24 ; *Peat v. Crane*, 2 Dick. 449 note. See also *Jackson v. Jackson*, 1 Atk. 513 ; *Knight v. Earl of Plymouth*, 1 Dick. R. 126, 127 ; *Holland v. Hughes*, 16 Ves. 114 ; *Fyler v. Fyler*, 3 Beavan, R. 550.

of equity will, in such cases, require, that a trustee should act with all the scrupulous circumspection, caution, and wisdom, with which the court itself, from its long experience and superior means of information is accustomed to act; a doctrine, certainly, somewhat perilous to trustees, and startling to uninstructed minds. It is, to adopt the language of Lord Bacon, substituting for the private conscience of the trustee, "the general conscience of the realm, which is chancery."¹ [* But the rule, as here stated, implies nothing more than that a trustee who does not understand his duty shall be at the pains to learn it.]

§ 1273 *a*. If trustees are directed to invest trust money in government or other securities, or real security, and they do neither, they are responsible, at the option of the *cestuis que trust*, either for the money, or the stock which might have been purchased therewith at the time when the investment ought to have been made.²

[* § 1273 *b*. It seems that in cases where the *cestuis que trust* are very poor, the courts will suffer the exchange of trust funds from consols to bank stock, and will dispense with any restriction against receiving three dividends in one year.³

§ 1273 *c*. Trustees have no power to make the *cestuis que trust* parties to any copartnership or joint stock company; and if they assume any responsibility by way of subscription for shares subject to future calls, the obligation will be considered a personal one, on the part of the trustee, unless in the act of subscription pains is taken to guard against any such implication, in which case the extent of his liability will be solely a question of construction.⁴

§ 1273 *d*. A married woman *cestui que trust* has no power to consent to a loan to her husband of the trust moneys, and if a loss ensues in consequence, it must fall upon the trustee. And if she have a power of appointment of the *corpus* of the fund after her death, but no power of anticipation, her deed of consent to the loan to her husband will not be construed an appointment of the

¹ Bacon on Uses, by Rowe, p. 10.

² Watts v. Girdlestone, 6 Beavan, R. 188, 190; *Ante*, § 1262. See the Jurist, vol. 9 (1845), p. 227.

³ [* Ingram *in re*, 11 W. R. 980; S. C. 8 Law T. N. S. 758; Fanning *in re*, 10 Jur. N. S. 307.

⁴ Lumsden v. Buchanan, 4 McQ. House of Lords Cas. 950. See also Eager v. Barnes, 31 Beav. 579.

reversion, so as to make it liable for any loss consequent upon the loan.¹

§ 1273 *e.* It is a familiar principle of the law of trusts, that the trustee cannot acquire any title adverse to that of the *cestui que trust*, as to the trust property. And so long as the trustee is in possession of the estate, the statute of limitations will not operate against the claim of the *cestui que trust*, although the trustee, through error or otherwise, may treat himself as the trustee of another, and as such account for the rents of the land.² And the trustee is personally responsible for any loss by reason of the fraud and forgery of the solicitor employed by him.³

§ 1273 *f.* Joint trustees are responsible for the acts of each other, in the misapplication of the trust funds, where they have put the fund in the power of one of their number. And if such trustee pledge the avails of the trust fund, on private account, and the trustees for a long time acquiesce in such use of the fund, by not looking after its application, although in fact ignorant of its misapplication, they will be held so far bound by the acts of such co-trustee as to lose all priority of claim upon such misapplied trust fund.⁴]

§ 1274. So, if a trustee should invest trust money in mere personal securities, however unexceptionable they might seem to be, in case of any loss by the insolvency of the borrower, he would be held responsible; for, in all cases of this sort, courts of equity require security to be taken on real estate, or on some other thing of permanent value.⁵ Nay, it will be at the peril of the trustee, if

¹ *Fletcher v. Green*, 33 Beav. 426. But any advance made upon stocks in which the fund, while in court, is directed to be invested, will be allowed to go towards relieving the trustees from their liability. *Ib.* And the trustees were held liable only to the extent of the trust fund and four per cent interest. *Ib.*

² *Lister v. Pickford*, 11 Jur. N. S. 649.

³ *Bostock v. Floyer*, 11 Jur. N. S. 962; *Simpson v. Brown*, 11 Law T. N. S. 503; *Case v. James*, 7 Jur. N. S. 616.

⁴ *Allan v. Scott*, 12 Law T. N. S. 449. See also *Ingle v. Partridge*, 32 Law J. ch. 8; S. C. 32 Beav. 661.]

⁵ *Adye v. Feuillateau*, 1 Cox, R. 24; *Ryder v. Bickerton*, 3 Swanst. R. 80; S. C. 1 Eden, R. 149, note, and Mr. Eden's note (*a*), p. 150; *Holmes v. Dring*, 2 Cox, R. 1; *Wilkes v. Steward*, Cooper, Eq. R. 6. Even the bond of several persons is not distinguished from the bond of one person. "It was never heard of" (said Lord Kenyon, Master of the Rolls), "that a trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of a trustee; for an act may very probably be

trust money comes to his hands, (such as a debt due from a third person,) to suffer it to remain upon the mere personal credit of the debtor, although the testator, who created the trust, had left it in that very state.¹ The principle is even carried further; and in cases of personal security taken by a trustee, he is made responsible for all deficiencies, and is also chargeable for all profits, if any are made. So that he acquires a double responsibility, although, in such cases, he may have acted with entire good faith, in the exercise of what he supposed to be a sound discretion.²

§ 1275. In relation to trust property, it is the duty of the trustee, whether it be real estate or be personal estate, to defend the title at law, in case of any suit being brought respecting it; to give notice, if it may be useful and practicable, of such suit to his *cestui que trust*; to prevent any waste, or delay, or injury to the trust property; to keep regular accounts;³ to afford accurate in-

done with the best and honestest intention; yet no rule in a court of equity is so well established as this." *Holmes v. Dring*, 2 Cox, R. 1, 2. Lord Northington, in *Hardon v. Parsons* (1 Eden, R. 148), laid down a much more limited doctrine, and held, that a letting of money, on personal security, was not, *per se*, gross negligence, and a breach of trust; and that other circumstances must be shown to charge the trustee. He said: "It is agreed that there is no text-writer that lays down the rule, nor any case which establishes it. If so, we must resort to the inquiry into the nature of the office and duty of a trustee, as considered in a court of equity. No man can require, or with reason expect a trustee to manage his property with the same care and discretion that he would his own. Therefore, the touchstone by which such cases are to be tried, is, whether the trustee has been guilty of a breach of trust or not. If he has been guilty of gross negligence, it is as bad in its consequences as fraud, and is a breach of trust. The lending of trust money on a note is not a breach of trust, without other circumstances, *crassæ negligentiae*." But the latter cases have entirely overthrown this doctrine, however reasonable it may seem to be. *Ibid.*, Mr. Eden's note (a). See also *Walker v. Symonds*, 3 Swanst. R. 62, 63; Mr. Chancellor Kent, in *Smith v. Smith*, 4 Johns. Ch. R. 281, 441, seemed inclined to adopt the doctrine of Lord Northington, and to think the modern English rule, as to lending money on personal security, too strict. [*In *Spear v. Spear*, 9 Rich. Eq. R. 184, it is said the trustee should invest trust moneys in public securities, or bond and mortgage, or at least bonds with proper sureties.]

¹ *Lowson v. Copeland*, 2 Bro. Ch. R. 156, and Mr. Belt's note; *Powell v. Evans*, 5 Ves. 844; *Tibbs v. Carpenter*, 1 Madd. R. 290.

² *Ady v. Feuilliteau*, 3 Swanst. R. 84, note; S. C. 1 Cox, R. 24. See *Holmes v. Dring*, 2 Cox, R. 1.

³ *Freeman v. Fairlie*, 3 Meriv. R. 29, 41; *Pearse v. Green*, 1 Jac. & Walk. 135 140; *Adams v. Clifton*, 1 Russ. R. 297.

formation to the *cestui que trust* of the disposition of the trust property ; and if he has not all the proper information, to seek for it, and if practicable, to obtain it.¹ Finally ; he is to act in relation to the trust property with reasonable diligence ; and in cases of a joint trust, he must exercise due caution and vigilance in respect to the approval of, and acquiescence in, the acts of his co-trustees ; for, if he should deliver over the whole management to the others, and betray supine indifference, or gross negligence, in regard to the interests of the *cestui que trust*, he will be held responsible.²

[* § 1275 *a*. But where a wife was entitled to an annuity, for her separate use, which was payable out of a mortgage on her husband's estate, she living with and being maintained by him, and the wife's trustee neglected to enforce payment of the mortgage and interest, and was therefore held liable for a breach of trust, it was nevertheless held, that, as between the husband and wife the interest applied to their mutual benefit must be taken in discharge of her annuity, the trustee was also entitled to the same equity as against the wife, but that the accruing annuity could not be set off against a debt of the husband.³]

§ 1276. Where special directions are given by the instrument creating the trust, or special duties are imposed upon the trustee, he must follow out the objects and intentions of the parties faithfully, and be vigilant in the discharge of his duties. There are, necessarily, many incidental duties and authorities, belonging to almost every trust, which are not expressed. But these are to be as steadily acted upon and executed, as if they were expressed. It would be impossible, in a work like the present, to make even a general enumeration of these incidental duties and authorities of a trustee ; as they must always depend upon the peculiar objects and structure of the trust.⁴

¹ Walker *v.* Symonds, 3 Swanst. R. 58, 73.

² Oliver *v.* Court, 8 Price, R. 127 ; *Post*, § 1280.

³ [* Payne *v.* Little, 26 Beavan, 1. See also Raby *v.* Ridehalgh, 7 De G. M. & G. 104. It is here intimated that, in the absence of directions as to investment, trustees cannot properly invest on mortgage. See also Bate *v.* Hooper, 5 De G. M. & G. 338.]

⁴ The works of Mr. Hampson and Mr. Willis, on the duties and responsibilities of trustees, contain an enumeration of many particulars. In all cases of doubt, it is best to act under the direction of a court of equity ; which trustees at all times have a right to ask. See Mitf. Eq. Pl. by Jeremy, 133, 134 ; Leech *v.* Leech, 1 Ch. Cas. 249.

§ 1277. In regard to interest upon trust funds, the general rule is, that, if a trustee has made interest upon those funds, or ought to have invested them so as to yield interest, he shall, in each case, be chargeable with the payment of interest.¹ In some cases, courts of equity will even direct annual or other rests to be made; the effect of which will be, to give to the *cestuis que trust* the benefit of compound interest. But such an interposition requires extraordinary circumstances to justify it.² Thus, for example, if a trustee, in manifest violation of his trust, has applied the trust funds to his own benefit and profit in trade; or has sold out the trust stock, and applied the proceeds to his own use; or has conducted himself fraudulently in the management of the trust funds; or has wilfully refused to follow the positive directions of the instrument, creating the trust, as to investments; in these, and the like cases, courts of equity will apply the rule of annual or semi-annual rests, if it will be most for the benefit of the *cestui que trust*.³ The true rule in equity in such cases is, to take care that all the gain shall go to the *cestui que trust*.⁴

[* § 1277 *a*. It seems to be considered as settled in the English chancery, that if the trustee himself put the trust money into his own business, by which he realizes a profit beyond the rate of interest on the public stocks or other proper securities for the in-

¹ 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 543, 544; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3, p. 145, 146; Dunscomb v. Dunscomb, 1 Johns. Ch. R. 508; Manning v. Manning, Id. 527; Schieffelin v. Stewart, 1 Johns. Ch. R. 620.

² Raphael v. Boehm, 11 Ves. 91; S. C. 13 Ves. 407, 590; Schieffelin v. Stewart, 1 Johns. Ch. R. 620; Evertson v. Tappen, 5 Johns. Ch. R. 497, 517; Dornford v. Dornford, 12 Ves. 127; Connecticut v. Jackson, 1 Johns. Ch. R. 13; Foster v. Foster, 2 Bro. Ch. 616; Davis v. May, 19 Ves. 383; Sevier v. Greenway, 19 Ves. 413; Webber v. Hunt, 1 Madd. R. 13; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 545; 2 Madd. Ch. Pr. 114, 115. [* There seems to be a rule in the English chancery courts, whereby a mortgagee taking possession of the premises, when no interest is in arrear, is presumed to have waived his general right to insist upon being paid his debt in such sums as the contract stipulates, and to have acceded to the claim of the debtor to pay it in such dribblets as the rent will produce, and he is therefore held bound to account on the basis of annual rests. But if he enters when there is an arrear of interest, no such implication arises, it is said. Nelson v. Booth, 5 Jur. N. S. 28.]

³ Ibid.

⁴ Schieffelin v. Stewart, 1 Johns. Ch. R. 620, 624, 625; 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 543, 544; Com. Dig. Chancery, 4 W. 25.

vestment of trust funds, or even beyond the legal rate of interest, the *cestui que trust* is entitled to such profit. But if the trustee loan the trust money to others, who know of the breach of trust thus committed, the *cestuis que trust* may follow the money into their hands, but they cannot claim any profits which they may have made beyond legal interest, but are limited to the compensation stipulated by the borrowers, if that is not less than the trustee could have realized in a prudent investment.¹ Where the surviving partner was made the executor of the deceased partner, and continued the business, taking in two other partners, it was held that he was accountable personally and bound to pay over, to those entitled on behalf of the deceased partner, all the profits resulting from the improper use of the partnership effects, and that the subsequent partners were not necessary parties. The case of *Simpson v. Chapman*,² where it was held such partners were necessary parties, was here commented upon and held not well founded and not therefore to be followed.³

§ 1277 b. And where one of the trustees was in possession of railway debentures, executed to all the trustees, and, by means of a forged transfer in the name of all, sold the same, and the transfer had been recorded in the books of the company in favor of a *bonâ fide* purchaser, it was held, upon a bill by the other trustees, to have the transfer set back and declared void, that the possession of the debentures by one trustee gave him no implied authority to deal with them, and the transfer was declared void, and the entry in the books of the company was required to be cancelled and the debentures to be delivered up to the trustees.⁴

§ 1277 c. The rule is well settled, that the trustee with power of sale cannot himself become a purchaser of the estate.⁵ Nor can the trustee be allowed to make any profit, personally, out of the trust estate, even by charging for professional services performed by him for the benefit of the trust estate. But it has been held this will not extend to the case where the trustee, being

¹ [* *Stroud v. Gwyer*, 6 Jur. N. S. 719. See also *Dimes v. Scott*, 4 Russ. 195, which is here commented upon; also *Ante*, § 676 b.

² 4 De G. M. & G. 154.

³ *McDonald v. Richardson*, 5 Jur. N. S. 9. See also *Palmer v. Mitchell*, 2 My. & K. 672, note.

⁴ *Cottam v. Eastern Counties Railw. Co.* 1 Johns. & H. 243. See also *Cowell v. Gatcombe*, 27 Beav. 568.

⁵ *Ingle v. Richards*, 28 Beav. 361.

a solicitor, employed his partner professionally on the part of the trust, upon the terms of such partner alone being entitled to the profits, and the court allowed the charges for his services.¹

§ 1277 *d.* Where the husband, in making a settlement upon his wife, had assigned a policy upon his life, and covenanted with the trustees to keep up the policy, but the trustees neglected to obtain possession of the policy or to give notice of the assignment to the office, and the same was subsequently mortgaged by the husband and finally surrendered, the husband appearing to be in insolvent circumstances and unable to keep up the policy, and the trustees having no funds for that purpose, it was held that the trustees were not liable for the loss.² But this seems a very favorable decision towards them.

§ 1277 *e.* The trustees, distributing the fund, upon a forged marriage certificate, to persons not entitled to it, were held liable to refund the same with interest from the date of the wrongful payment.³ The question of the responsibility of new trustees, for not looking after the fund in the hands of the old trustees, is extensively discussed in a recent English case, and the point of what facts shall be sufficient to charge the new trustee with notice and default of duty is here largely discussed.⁴

§ 1277 *f.* The effect of agency for trustees is considered in a

¹ *Clack v. Carlon*, 7 Jur. N. S. 441. See also *Crosskill v. Bower*, 32 Beav. 86; where it was held that bankers could not make any profit of their trust or charge above five per cent on money advanced by them. See also *Tyrrell v. Bank of London*, 10 Ho. Lds. Cas. 26, where the question of the compensation of trustees acting professionally as solicitors is extensively discussed, and also the right of trustees to make profits for themselves. But where the trustee proved he gave full consideration, and purchased the trust estate with full and free consent, on the part of the *cestui que trust*, a bill to set aside the sale was dismissed with costs. *Luff v. Lord*, 10 Jur. N. S. 1248. And after an ineffectual effort to sell a trust estate at auction, leave was given for one of the trustees to purchase it, at the price at which it had been bought in, that appearing beneficial to the parties interested. *Farmer v. Dean*, 32 Beavan, 327. And a trustee cannot retire from the trust for the purpose of becoming a purchaser. *Spring v. Pride*, 10 Jur. N. S. 646. But where the trustee has openly, and with perfect fairness, and with the concurrence of those having the beneficial interest in the estate, contracted for the purchase, the court will not set it aside. *Dover v. Buck*, 11 Jur. N. S. 580.

² *Hobday v. Peters*, 28 Beav. 603.

³ *Eaves v. Hickson*, 7 Jur. N. S. 1297; S. C. 30 Beav. 136. See also *Barratt v. Wyatt*, 8 Jur. N. S. 1045, where payments were mistakenly made under a supposed order of court, and the trustees nevertheless held responsible.

⁴ *Geaves ex parte*, 8 De G. M. & G. 291.

recent case¹ where it was held that payment to the agent of the trustees is payment to the trustees. And if the agent pay the money, in good faith, to a party not entitled to hold it, whereby it is lost; such agent cannot be made responsible in a separate bill against him alone, without joining the trustees; since it is only through the trustees that such agents are liable at all. But co-trustees are not responsible for the fraud and forgery of one of their number to which they in no way contribute, either directly or remotely.²

§ 1278. The object of this whole doctrine is, to compensate the *cestui que trust*, and to place him in the same situation as if the trustee had faithfully performed his own proper duty. It has even a larger and more comprehensive aim, founded in public policy, which is to secure fidelity by removing temptation, and by keeping alive a sense of personal interest and personal responsibility.³ It seems, however, to have been of a comparatively late introduction into equity jurisprudence; and probably was little known in England at an earlier period than the reign of Charles the Second.⁴

§ 1279. The Roman law acted with the same protective wisdom and foresight. In that law, if a guardian, or other trustee, was guilty of negligence in suffering the money of his ward to remain idle, he was chargeable, at least, with the ordinary interest. *Quod si pecunia mansisset in rationibus pupilli, præstandum quod bonâ fide percepisset, aut percipere potuisset, sed fœnori dare, cum potuisset, neglexisset; cum id, quod ab aliq. debitore nomine usurarum cum sorte datur, ei, qui accipit, totum sortis vice fungitur, vel fungi debet.*⁵ But where the guardian, or other trustee, went beyond the point of mere negligence, and was guilty of a gross abuse of his trust, the Roman law sometimes inflicted upon him a grievous interest, in the nature of a compound interest, but often greatly exceeding it.⁶ *Quoniam, ubi quis ejus pecuniam, cujus tutelam*

¹ Robertson v. Armstrong, 28 Beav. 123.

² Barnard v. Bagshaw, 9 Jur. N. S. 220.]

³ Schieffelin v. Stewart, 1 Johns. Ch. R. 620, 624, 625; 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (p); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 543, 544; Com. Dig. Chancery, 4 W. 25.

⁴ Ibid.; Ratcliffe v. Graves, 1 Vern. R. 196, 197; S. C. 2 Ch. Cas. 152.

⁵ Dig. Lib. 26, tit. 7, l. 58, § 1; Id. l. 7, § 3, 4; Dunscomb v. Dunscomb, 1 Johns. Ch. R. 510, 511; 1 Domat, B. 2, tit. 1, § 3, art. 22, 27; Pothier, Pand. Lib. 27, tit. 3, n. 45 to 51.

⁶ See Pothier, Pand. Lib. 27, tit. 3, n. 47; 1 Domat, B. 5, tit. 5, § 1, art. 14.

*negotiave administrat, aut Magistratus municipii publicam in usus suos convertit, maximas usuras præstat. Sed istius diversa causa est, qui non sibi sumsit ex administratione nummos, sed ab amico accepit, et ante negotiorum administrationem. Nam illi, de quibus constitutum est (cum gratuitam certe integram et abstinentem omni lucro præstare fidem deberent) licentia, quâ videntur abuti, maximis usuris, vice cujusdam pænæ, subjiciuntur.*¹

§ 1280. In cases where there are several trustees, the point has often arisen, how far they are to be deemed responsible for the acts of each other. The general rule is, that they are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement, by which they have expressly agreed to be bound for each other; or they have, by their own voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust.² And the mere fact, that trustees, who are authorized to sell lands for money, or to receive money, jointly execute a receipt therefor to the party who is debtor or purchaser, will not ordinarily make either liable, except for so much of the money as has been received by him; although in the case of executors, it might be different. The reasons assigned for the doctrine and the difference are as follows. Trustees have all equal power, interest, and authority, and cannot act separately, as executors may; but must join, both in conveyances and receipt. For one trustee cannot sell without the other; or make a claim to receive more of the consideration-money, or to be more a trustee than the other. It would, therefore, be against natural justice to charge them (seeing they are thus compellable, either not to act at all or to act together) with each other's receipts, unless there be some default or negligence on their own part, independent of joining in such receipt.³ [* Where one acts as trustee, although the formal appointment is not complete in all its particulars, he will be held responsible, as such.⁴ And it has been recently held, that the

¹ Dig. Lib. 3, tit. 5, l. 38. See also Dig. Lib. 26, tit. 7, l. 7, § 4 to 10; Cod Lib. 5, tit. 56; Pothier, Pand. Lib. 3, tit. 5, n. 43; 2 Voet ad Pand. Lib. 26, tit. 7, § 9; Schieffelin v. Stewart, 1 Johns. Ch. R. 628, 629.

² Ante, § 1275; Taylor v. Roberts, 3 Ala. R. (N. S.) 83.

³ 2 Fonbl. Eq. B. 2, ch. 7, 5; Fellows v. Mitchell, 1 P. Will. 83, and Mr. Cox's note (1); Churchill v. Lady Hobson, 1 P. Will. 241, and Mr. Cox's note (1); Leigh v. Barry, 3 Atk. 584; Ex parte Belchier v. Parsons, Ambler, 219, and Mr. Blunt's note. See Hulme v. Hulme, 2 Mylne & Keen, 682.

⁴ [* Pearce v. Pearce, 22 Beavan, 248.

rule that a trustee is only liable for his own receipts does not apply where a trustee assists or enables another trustee to receive the money; as, for instance, by joining with him in a release for the money, although he alone obtain possession of the money and invest it in improper securities. And it was held, accordingly, that, in such a state of facts, both trustees were responsible for the consequent loss.¹ A member of a firm, who is both debtor and trustee, may be charged without joining the other members of the firm.^{2]}

§ 1280 a. But with regard to executors, where there are two executors, it is clear that each has a several right to receive the debts due to the estate, and all other assets which shall come to his hands; and he is, consequently, solely responsible for the assets which he receives. They are, therefore, not compellable to join in receipts; and each is competent, by his own separate receipt, to discharge any debtor to the estate. If, then, they join in a receipt, it is their own voluntary act, and equivalent to an admission of their willingness to be jointly accountable for the money.³ It follows, *à fortiori*, that, if one executor, after receiving the assets, voluntarily pays them over to the other executor, he becomes responsible for the due application and administration of those assets by the other executor.⁴ So, if one executor knows that the assets

¹ *Thompson v. Finch*, 22 Beavan, 316; *Townley v. Sherborne*, *Bridgman*, 35, and *Langford v. Gascoyne*, 11 Vesey, 335, are here referred to and distinguished from the case before the court.

² *Norton v. Steinkopf*, *Kay*, 45.]

³ Note 3, p. 512; *Murrell v. Cox*, 2 Vern. 570; *Aplyn v. Brewer*, *Prec. Ch.* 173; *Moses v. Levi*, 3 Younge & Coll. 359, 367.

⁴ *Edmonds v. Crenshaw*, 14 Peters, R. 166. On this occasion Mr. Justice McLean, in delivering the opinion of the court, said: "Where there are two executors in a will, it is clear that each has a right to receive the debts due to the estate, and all other assets which shall come into his hands; and he is responsible for the assets he receives. This responsibility results from the right to receive, and the nature of the trust; and how can he discharge himself from this responsibility? In this case the defendant has attempted to discharge himself from responsibility by paying over the assets received by him to his co-executor. But such payment cannot discharge him. Having received the assets in his capacity of executor, he is bound to account for the same; and he must show that he has made the investment required by the will, or in some other mode, and in conformity with the trust, has applied the funds. One executor, having received funds, cannot exonerate himself, and shift the trust to his co-executor, by paying over to him the sums received. Each executor has a right to receive the debts due to the estate, and discharge the debtors; but this rule does not apply as be-

received by the other executor are not applied according to the trusts of the will, or in a due course of administration, and he stands by and acquiesces in it, or suffers the assets to be wasted by such executor, without any effort to require or compel a due execution of the trusts and a due application of the assets, in the course of the administration thereof, he will be held liable for any waste or misapplication of such assets.¹ It will be otherwise, however, between the executors. They stand upon equal ground, having equal rights, and the same responsibilities. They are not liable to each other, but each is liable to the *cestuis que trust*, to the full extent of the funds he receives. *Douglass v. Satterlee*, 11 Johns. 16; *Fairfax's Executors v. Fairfax*, 5 Cranch, 19."

¹ *Clark v. Clark*, 8 Paige, R. 152; *Williams v. Nixon*, 2 Beavan, R. 472. In this last case, Lord Langdale said: "There can be no doubt, that, if an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing anything on his part to procure the due execution of the trusts, he will, in respect to that negligence, be himself charged with the loss; but in cases of this kind it is always to be observed, that the testator himself, having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors; and in that character each has a separate right of receiving and of giving discharges for the property of the testator. In this particular case the testator, having money in the funds, and other property to a considerable amount, directed certain annuities to be paid, and bequeathed his residuary estate in the mode stated. Both executors proved the will, and thereupon each of them became entitled to receive the property. One of them did receive the property, — the dividends upon the stocks and funds, and the other personal estate. If Mr. Nixon knew that his co-executor was misapplying the moneys thus received, and acquiesced in it, he became himself liable; because he was a witness and an acquiescing party to the misapplication or breach of trust; but if he was not aware of the misapplication, I know of no case in which the court has gone the length of saying, that an executor shall be held personally answerable for standing by and permitting his co-executor to do that, which, for anything he knows to the contrary, was a performance of the trusts of the will. In this case it is clear, Mr. Nixon must have known there was stock in the funds. He might have known, that the dividends, arising from that stock, were from time to time received by Mr. Mills; knowing that he might, nevertheless, have full reason to believe that they were duly applied, according to the trusts and directions of the will, in satisfaction of the annuities, or of the rent of the leasehold estates possessed by the testator at his death, and which was payable out of the whole estate. The argument for the plaintiffs proceeds upon this, that you are to impute to Mr. Nixon a knowledge of all that he might have known. It is said, he proved the will, and must, therefore, have known its contents, and what was to be done in pursuance of the trusts; this is a presumption, which I think the law itself will draw, and he must, therefore, be taken to have known the contents of the will; then it is argued, that, on proving the will, he was bound to make a statement upon oath respecting the value of the property, and therefore became acquainted with the

ever, if one executor has no knowledge of the receipt, or misapplication, or waste, of the assets by the other.¹

§ 1281. The propriety of the doctrine, which, in favor of trustees, makes them liable only for their own acts and receipts, has never been questioned; and, indeed, stands upon principles of general justice. It has been well said, that it seems to be substantial injustice, to decree a man to answer for money, which he did not receive, at the same time, that the charge upon him, by his joining in the receipt, is but notional.² There is a good deal more question as to the distinction, which is made unfavorably in regard to executors. In truth, upon general reasoning, it seems difficult to maintain its sound policy, or practical convenience, or intrinsic equity. It has, on this account, been sometimes struggled against. But it is now finally established, as a general rule, in the equity jurisprudence of England, although, perhaps, not universally in that of America.³

particulars. He might have had some knowledge of it, to the limited extent which can be known on such occasions; but I cannot impute to him a knowledge of the exact state or amount of the property, or of the claims upon it, or the clear amount of the balance in the hands of his co-executor. I certainly do not recollect any case, in which the principle has been carried to the extent to which it has been here pressed; and if, in this case, I were to charge Mr. Nixon generally with all the assets received by his co-executor, I must, in every other case, say, that an executor, who does not personally act, and who, having no reason to suspect any misapplication by his co-executor, permits him to act alone, is liable for every misapplication committed by his co-executor; I do not think I can lay down any such rule." *Post*, § 1283, 1284.

¹ *Ibid*.

² Lord Cowper, in *Fellows v. Mitchell*, 1 P. Will. 83.

³ 2 Fonbl. Eq. B. 2, ch. 7, § 5, and note (l); Mr. Cox's note (1) to *Fellows v. Mitchell*, 1 P. Will. 83, and to *Churchill v. Lady Hobson*, 1 P. Will. 241, and Mr. Eldon's note to *Westley v. Clarke*, 1 Eden, R. 360; *Murrell v. Cox*, 2 Vern. 570. Lord Harcourt struggled against it in *Churchill v. Lady Hobson*, 1 P. Will. 241. In *Westley v. Clarke* (1 Eden, R. 357), Lord Northington shook it to its very foundation. His lordship there said: "This bill is brought by a legatee to charge two executors with assets not actually received by them; but for which they had given a receipt; and by that, as the plaintiffs insist, made themselves liable for the actual receipt of the money by the third. And the claim is founded on this: That it is a general rule in this court, that, if executors join in a receipt, they make themselves all liable *in solido*, because it is an unnecessary act, as each executor has an absolute power over the personal assets and rights of the testator. And that the contrary rule holds with respect to trustees; that they are not answerable for joint receipt, each *in solido*, but only in proportion to what they actually receive. But, though there are distinctions in the books concerning the

§ 1282. But, although the general rule, in regard to trustees, is, that they shall be liable only for their own acts and receipts, yet acts of trustees and those of executors, according to the cases cited for that purpose; yet those distinctions seem not to be taken with precision sufficient to establish a general rule; for a joint receipt will charge trustees *in solido* each, if there is no other proof of the receipt of the money. As, if a mortgage is devised in trust to three trustees, and the mortgagor, with his witness, meets them to pay it off; the money is laid on the table, and the mortgagor, having obtained a reconveyance and receipt for his money, withdraws, each trustee is answerable *in solido*. On the contrary, in the case of *Churchill v. Hobson*, where executors gave a joint receipt, only one was held liable. And this authority, which is not an exception of any particular case, but an exception grounded on circumstances, shows there is no such rule. So that the rule seems to amount to no more than that a joint receipt given by executors is a stronger proof, that they actually joined in the receipt; because, generally, they have no occasion to join for conformity. But if it appears plainly, that one executor only received, and discharged the estate indebted, and assigned the security, and the others joined afterwards, without any reason, and without being in a capacity to control the act of their co-executor, either before or after that act was done, what grounds has any court, in conscience, to charge him? Equity arises out of a modification of acts, where a very minute circumstance may make a case equitable or iniquitous. And, though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the right of courtesy or dower; yet there can be no rule for the future determination of this court concerning the acts of men." — Lord Alvanley admitted the rule with great reluctance, in *Hovey v. Blakeman* (4 Ves. 607, 608), insisting that it was not conclusive; and his remarks have great cogency and clearness. But it is now established by what must be deemed overruling authority. See *Sadler v. Hobbs*, 2 Bro. Ch. R. 114; *Scarfield v. Howes*, 3 Bro. Ch. R. 94, 95; *Chambers v. Minchin*, 7 Ves. 197 to 199 (in which Lord Eldon vindicated the rule against the objections taken to it); *Brice v. Stokes*, 11 Ves. 324; *Doyle v. Blake*, 2 Sch. & Lefr. 242; *Joy v. Campbell*, 1 Sch. & Lefr. 341; *Shipbrook v. Lord Hinchinbrook*, 16 Ves. 477, 479, 480. In the recent case of *Moses v. Levi*, 3 Younge & Coll. 359, 367, Mr. Baron Alderson affirmed the rule, and held, that one executor, who had paid over money to his co-executor, for the purpose of paying the same to residuary legatees, was guilty of negligence, and, therefore, liable for the misapplication of the money by the co-executor. He then added: "If the case stood on this ground alone, it appears to me that it would come within the principle of *Lord Shipbrook v. Lord Hinchinbrook* (11 Ves. 252); *Underwood v. Stevens* (1 Meriv. R. 712), and *Langford v. Gascoyne* (11 Ves. 333), in which it is laid down generally, that if an executor permits his co-executor to obtain possession of money, which he had at any time in his own possession, and afterwards the co-executor misapplies the money, both executors are personally responsible. And that it would not fall within the case of *Bacon v. Bacon* (5 Ves. 331), and that class of cases in which it was held, that the executor shall be allowed the benefit of what he has handed over to his co-executor, in the due and ordinary course of the administration of the testator's estate. Mr. Chancellor Kent, in his reasoning in *Monell v. Monell*

some nice distinctions have been indulged by courts of equity, which require notice in this place. Thus, for example, it has been said, that, where they join in a receipt for money, and it is not distinguishable on the face of the receipt, or by other proper proofs, how much has been received by one and how much by the other trustee, it is reasonable to charge each with the whole.¹ The case has been likened to that of a man wilfully mixing his own corn or money with that of another, where he who has made the difficulty shall not be permitted to avail himself of it; but, if there is any loss, he shall bear it himself.²

§ 1283. Perhaps the truest exposition of the principle, which ought, in justice, to regulate every case of this sort, whether it be the case of executors, or of guardians, or of trustees, is that which has been adopted by a learned equity judge in our own country. It is, that, if two executors, guardians, or trustees, join in a receipt for trust money, it is, *primâ facie*, although not absolutely, conclusive evidence that the money came to the hands of both. But either of them may show, by satisfactory proof, that his joining in the receipt was necessary, or merely formal, and that the money was, in fact, all received by his companion. And, without such satisfactory proof, he ought to be held jointly liable to account to the *cestui que trust* for the money, upon the fair implication, resulting from his acts, that he did not intend to exclude a joint responsibility.³ But, wherever either a trustee, or an executor, by his own negligence or laches, suffers his co-trustee or co-executor, to receive and waste the trust fund or assets of the testator, when he has the means of preventing such receipt and waste, by the exercise of reasonable care and diligence, then, and in such a case, such trustee or executor will be held personally responsible for the

(5 Johns. Ch. R. 283), so far as it goes, seems to repel the distinction between trustees and executors. See also *Manahan v. Gibbons*, 19 Johns. R. 427, 440; *Sutherland v. Brush*, 7 Johns. Ch. R. 22, 23; *Crosse v. Smith*, 7 East, R. 256; 257.

¹ *Fellows v. Mitchell*, 1 P. Will. 83; S. C. 2 Vern. 415, 504; 2 Fonbl. Eq. B. 2, ch. 7, § 5.

² *Ibid.*; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 108; *Mumford v. Murray*, 6 Johns. Ch. R. 1, 16.

³ *Monell v. Monell*, 5 Johns. Ch. R. 296. See also *Harvey v. Blakeman*, 4 Ves. 596; *Crosse v. Smith*, 7 East, R. 244; *Scurfield v. Howes*, 3 Bro. Ch. R. 93, and Mr. Belt's notes; *Westley v. Clarke*, 1 Eden, R. 357; *Joy v. Campbell*, 1 Sch. & Lefr. 341; *Sutherland v. Brush*, 7 Johns. Ch. R. 22.

loss occasioned by such receipt and waste of his co-trustee or co-executor.¹

§ 1283 *a*. The mere appointment by the trustees of one of them to be the factor of the others for the property, is not of itself such a breach of trust as subjects the other trustee to all the consequences of it, nor does it make them liable as such for permitting the factor trustee to retain balances in his hands, unless they are thereby guilty of gross negligence. Still, however, by the appointment of such trustee as factor, they become liable for his default as agent, although not as trustee, in the same way that they would be liable for the defaults of any other person whom they might appoint to the office.² And a trustee, by becoming the factor or cashier of the trust property, does not thereby incur any additional liability in respect to its management beyond what he was subject to as trustee.³

§ 1284. Again; if, by any positive act, direction, or agreement of one joint executor, guardian, or trustee, the trust-money is paid over, and comes into the hands of the other, when it might and should have been otherwise controlled or secured by both, there, each of them will be held chargeable for the whole.⁴ So, if one

¹ *Clark v. Clark*, 8 Paige, R. 152; *Ante*, § 845 *a*; *Edmonds v. Crenshaw*, 14 Peters, R. 166; *Williams v. Nixon*, 2 Beavan, R. 472; *Ante*, § 1280, 1280 *a*.

² *Horne v. Pringle*, 8 Clarke & Fin. R. 264, 286, 287, 288, 289.

³ *Ibid*.

⁴ *Gill v. Attorney-General*, Hardres, R. 314; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 479, 480; *Sadler v. Hobbs*, 2 Bro. Ch. R. 116; *Underwood v. Stevens*, 1 Meriv. R. 712; *Adair v. Shaw*, 1 Sch. & Lefr. 272; *Joy v. Campbell*, 1 Sch. & Lefr. 341; *Monell v. Monell*, 5 Johns. Ch. R. 294 to 296; *Bone v. Cooke*, 1 McClelland, R. 168. It is not easy to reconcile the language used in all the cases, as to what acts, directions, and omissions of one trustee shall make him chargeable. Lord Redesdale, in *Joy v. Campbell* (1 Sch. & Lefr. 341), states the doctrine thus: "The distinction seems to be this, with respect to a mere signing; that, if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving. But, if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge. And the true question, in all those cases, seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor, who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning. He became responsible for the application of the money, just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor; for example, an executor, living in London, is to pay debts in Suf-

trustee should wrongfully suffer the other to detain the trust-money a long time in his own hands, without security; or should lend it to the other on his simple note; or should join with the other in lending it to a tradesman upon insufficient security; in all such cases he will be deemed liable for any loss.¹ *A fortiori*, one trustee will be liable, who has connived at, or been privy to, an embezzlement of the trust money by another; or if it is mutually agreed between them that one shall have the exclusive management of one part of the trust property, and the other of the other part.²

§ 1284 a. But here it may be important to take notice of another illustration of the doctrine, that courts of equity administer their aid only in favor of persons who exercise due diligence to enforce their rights, and are guilty of no improper acquiescence or delay; upon the maxim so often referred to, *vigilantibus, non dormientibus, æquitas subvenit*. Hence, if there be a clear breach of trust by a trustee; yet, if the *cestui que trust*, or beneficiary, has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him; but leave him to bear the fruits of his own negligence or infirmity of purpose.³

[* § 1284 b. The course of inquiry in regard to the default of trustees, in the English courts of chancery, is more formal than in the American courts of equity. A trustee cannot be put on trial

folk, and remits money to his co-executor to pay these debts. He is considered to do this of necessity. He could not transact business without trusting some persons; and it would be impossible for him to discharge his duty, if he is made responsible, where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India, and another in England, the assets being in India, but to be applied in England. There the co-executor is appointed for the purpose of carrying on such transaction; and the executor is not responsible, for he must remit to somebody; and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence.”

¹ *Sadler v. Hobbs*, 2 Bro. Ch. R. 114; *Keble v. Thomson*, 3 Bro. Ch. R. 112; *Langston v. Ollivant*, Cooper, R. 33; *Caffrey v. Darby*, 6 Ves. 488; *Bone v. Cooke*, 1 McClell. R. 168; *Brice v. Stokes*, 11 Ves. 319; *Chambers v. Minchin*, 7 Ves. 197, 198; 2 Fonbl. Eq. B. 2, Ch. 7, § 5, and note (k); *Mumford v. Murray*, 6 Johns. Ch. R. 1, 16.

² 2 Fonbl. Eq. B. 2, ch. 7, § 5, note (k) and (l); *Gill v. Attorney-General*, *Hardres*, R. 314; *Boardman v. Mosman*, 1 Bro. Ch. R. 68; *Bate v. Scales*, 14 Ves. 402; *Oliver v. Court*, 8 Price, 127.

³ *Broadhurst v. Balguay*, 1 Younge & Coll. New R. 16, 28 to 32.

there, for an account through wilful default or neglect, unless the plaintiff allege such default in his bill and prove at least one act of wilful neglect, or default, in the preliminary hearing before the court, who direct the inquiry before the master.¹ This rule was established by Lord Eldon and has been adhered to until the present time.²

§ 1284 *c.* And where there are numerous trustees, the personal responsibility of each, for the acts of the others, must depend much upon his ability to interpose and hinder the others from pursuing the course which resulted in the loss. This will depend upon the nature of the trust and how far the duty and right to act is joint, and incapable of execution, except by the concurrence of all the trustees. In general, this concurrence is required in regard to trusts which are of a private and personal nature.³ But in regard to such trusts as are of a public nature, the trustees may act by the majority.⁴ And all trusts which partake of an official character, such as that of executors and administrators, in the settlement of estates, may be performed severally, as in the collection of debts.⁵ This may be, as before suggested, the chief ground of distinction in regard to the liability of trustees and executors for the acts of each other.]

§ 1285. In cases of a breach of trust, the question has arisen, in what light the debt, created by such breach of trust, is to be viewed; whether it is to be deemed a debt by simple contract, and so binding upon the personal assets, only, of the trustee, or a debt by specialty. At law, so far as any remedy exists there, the debt is treated as a simple contract debt, even though the trust arises under a deed executed by the trustees, and contains a clause, that no trustee shall be chargeable or accountable for any money arising in execution of the trust, except what he shall actually receive, unless there be some correspondent covenant also on the part of the trustees. For this is a common clause of indemnity in trust-deeds; and the true sense of it is, that the trustees shall not be accountable for more than they receive. They are, in fact, account-

¹ [* *Sleight v. Lawson*, 3 Kay & J. 292; *Coope v. Carter*, 2 De G. M. & G. 297, 298.

² *Ibid.*

³ *Ante*, § 1062.

⁴ *Perry v. Shipway*, 5 Jur. N. S. 535.

⁵ *Gleason v. Lillie*, 1 Aikens, 28.]

able for what they actually receive ; but not accountable as under a covenant.¹

§ 1286. The rule in courts of equity is the same. The debt created by a breach of trust is there considered but as a simple contract debt, even although circumstances of fraud appear ;² unless, indeed, there be some acknowledgment of the debt by the trustee under seal. But, in cases of this sort, if the specialty creditors exhaust the personal assets, courts of equity will let a simple contract creditor of this sort, equally with other simple contract creditors, stand in the place of the specialty creditors, in order to obtain satisfaction out of the real estate of the testator.³

§ 1287. Courts of equity will not only hold trustees responsible for any misapplication of trust property, and any gross negligence or wilful departure from their duty in the management of it ; but they will go farther, and in cases requiring such a remedy, they will remove the old trustees and substitute new ones.⁴ Indeed, the appointment of new trustees is an ordinary remedy, enforced by courts of equity in all cases where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause.⁵ [* Where the scheme of a charity provided, that if “any or either of the trustees should depart the United Kingdom, from whatever cause or motive, or under whatsoever circumstances, he should be considered as discharged,” and disqualified, it was held that a temporary absence abroad was not within the provision.⁶ So the bankruptcy of the trustee is no cause of removal unless it will in some degree endanger the trust.⁷]

§ 1288. The doctrine seems to have been carried so far by the courts, as to remove a joint-trustee from a trust, who wished to

¹ *Bartlett v. Hodgson*, 1 T. Rep. 42, 44.

² *Vernon v. Vawdry*, 2 Atk. 119 ; 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (b) ; 2 Madd. Ch. Pr. 114.

³ *Cox v. Bateman*, 2 Ves. 18, 19.

⁴ *January v. Rutherford*, 9 Paige, R. 273.

⁵ *Ellison v. Ellison*, 6 Ves. 663, 664 ; 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (a) ; *Lake v. De Lambert*, 4 Ves. 592 ; 2 Madd. Ch. Pr. 133 ; *Millard v. Eyre*, 2 Ves. Jr. 94 ; *Buchanan v. Hamilton*, 5 Ves. 722 ; *Hibbard v. Lambe*, Ambler, R. 309 ; *Com. Dig. Chancery*, 4 W. 7.

⁶ [* *The Moravian Society, in re*, 26 Beavan, 101.

⁷ *Bridgman's Trust, in re*, 6 Jur. N. S. 1065.]

continue in it, without any direct or positive proof of his personal default, upon the mere ground that the other co-trustees would not act with him; for, in a case where a trust is to be executed, if the parties have become so hostile to each other that they will not act together, the very danger to the due execution of the trust, and the due disposition of the trust-fund, requires such an interposition to prevent irreparable mischief.¹

§ 1289. But, in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust.² It is not, indeed, every mistake, or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course.³ But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of a proper capacity to execute the duties, or a want of reasonable fidelity.

[* § 1289 *a*. Where the testator provided that his widow should have the profits of a certain portion of his estate, “so that she might maintain herself, and their children, and educate them,” and if these profits were insufficient for that purpose, the deficiency to be supplied out of the income of the general estate; and she eloped with a married man, and the children brought a bill for an account and for the direction of the court, in regard to their future maintenance, it was ordered, notwithstanding “the widow by her answer, expressed contrition for her conduct, and stated that she had entirely separated from the person with whom she eloped,” that, having by her misconduct become unfit to maintain and educate the children, she was not entitled to the surplus profits, after setting apart sufficient for their maintenance and education, but could only claim maintenance for herself.⁴]

§ 1290. The jurisdiction of courts of equity over trusts and other matters, beyond the forum, is important to be considered.

¹ *Uvedale v. Ettrick*, 2 Ch. Cas. 130; *Com. Dig. Chancery*, 4 W. 7.

² *Portsmouth v. Fellows*, 5 Madd. R. 450; *Mayor, &c., of Coventry v. Attorney-General*, 2 Bro. Parl. Rep. 236; S. C. 7 Bro. Parl. R. by Tomlins, 235.

³ *Attorney-General v. Coopers' Company*, 19 Ves. 192.

⁴ [* *Castle v. Castle*, 1 De G. & J. 352. See also *Raikes v. Ward*, 1 Hare, 448; *Wetherell v. Wilson*, 1 Keen, 80; *Woods v. Woods*, 1 My. & Cr. 401; *Crockett v. Crockett*, 2 Phill. 553; *Brown v. Casamajor*, 4 Vesey, 498; *Hammond v. Neame*, 1 Swanst. 35; *Hadow v. Hadow*, 9 Simons, 438; *Browne v. Paull*, 1 Sim. N. S. 92; *Jodrell v. Jodrell*, 14 Beav. 397; *Longmore v. Elcum*, 2 Younge & Coll. C. C. 363.]

§ 1291. It is not essential that the subject-matter be within the absolute reach of the process of the court, called upon to act upon it; so that it can be directly and finally disposed of, or affected by the decree. If the proper parties are within the reach of the process of the court, it will be sufficient to justify the assertion of full jurisdiction over the subject-matter in controversy.¹ The decrees of courts of equity do, indeed, primarily and properly, act *in personam*, and, at most, collaterally only *in rem*.² Hence, the specific performance of a contract for the sale of lands, lying in a foreign country, will be decreed in equity, whenever the party is resident within the jurisdiction of the court.³ So, an injunction will, under the like circumstances, be granted to stay proceedings in a suit in a foreign country.⁴

§ 1292. These are not, however, peculiar or privileged cases for the exercise of jurisdiction; for courts of equity will, in all other cases, where the proper parties are within the territorial sovereignty, or within the reach of the territorial process, administer full relief, although the property in controversy is actually situate in a foreign country, unless, indeed, the relief which is asked is of a nature which the court is incapable of administering. Many instances of this sort may readily be adduced, to illustrate this general doctrine and its exceptions. Thus, a party resident in England, who is a joint tenant of land, situate in Ireland, may be decreed to account for the profits of such land in the Court of Chancery in England.⁵ But a bill for a partition of lands, situate in Ireland, will not be entertained in a court of chancery in England; because (as has been said) it is in the realty, and the court cannot award a commission into Ireland; and a bill for a partition is in the nature of a writ of partition at the common law, which lyeth not in England for lands in Ireland.⁶

§ 1293. The same doctrine is applied to cases of trusts attached

¹ Mead v. Merritt, 2 Paige, R. 402; Mitchell v. Bunch, 2 Paige, R. 606, 615; Com. Dig. Chancery, 4 W. 27.

² Penn v. Lord Baltimore, 1 Ves. R. 444; Mitchell v. Bunch, 2 Paige, R. 615.

³ Ante, § 743; Penn v. Lord Baltimore, 1 Ves. R. 444.

⁴ Ante, § 899, 900.

⁵ Com. Dig. Chancery, 3 X. 4 W. 27; Cartwright v. Pettus, 2 Ch. Cas. 214.

⁶ Cartwright v. Pettus, 2 Ch. Cas. 214; Carteret v. Petty, 2 Swanst. R. 323; S. C. 1 Eq. Abr. C. 133; Com. Dig. Chancery, 3 X. 4 E. 4 W. 27; Earl of Kildare v. Eustace, 2 Ch. Cas. 188; S. C. 1 Vern. 419, 422; 1 Eq. Abr. 133, C. 4.

to land in a foreign country. They may be enforced by a court of equity in the country where the trustee is a resident, and to whose process he may rightfully be subjected.¹ It is also applied to cases of mortgages of lands in foreign countries. And a bill to foreclose or redeem such a mortgage may be brought in any court of equity, in any other country, where the proper parties are resident.² It was aptly said, by Lord Kenyon, when Master of the Rolls, in a case then before him: "It was not much litigated that the courts of equity here have an equal right to interfere with regard to judgments and mortgages upon the lands in a foreign country, as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this court cannot act upon the land directly, but acts upon the conscience of the person here." And, after citing some cases to this effect, he added: "These cases clearly show, that, with regard to any contract made in equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situate in England."³

§ 1294. The same doctrine is applied to cases of frauds, touching contracts or conveyances of real property, situate in a foreign country. Thus, if a rent-charge is fraudulently obtained on lands lying in Ireland, a bill to set it aside will be sustained in the Court of Chancery in England, if the defendant is a resident there.⁴ Courts of equity have gone even further, and have, in effect, as between the parties, overhauled the judgments of foreign courts,⁵ and even the sales made under those judgments, where fraud has intervened in those judgments, or a grossly inequitable advantage has been taken. In such cases, they do not, indeed, disregard such judgments, or directly annul or control them. But they arrive at the equities between the parties in the same manner as they would if the proceedings had been mere matters *in pais*, subject to their general jurisdiction.⁶

¹ Earl of Kildare *v.* Eustace, 1 Vern. 419, 422; 1 Eq. Abr. 133.

² Toller *v.* Carteret, 2 Vern. 494; S. C. 1 Eq. Abr. 134, pl. 5; Com. Dig. Chancery, 3 X.

³ Lord Cranstown *v.* Johnston, 3 Ves. Jr. 182; Earl of Derby *v.* Duke of Athol, 1 Ves. R. 202; Gascoine *v.* Douglas, 2 Dick. 431.

⁴ Earl of Arglasse *v.* Muschamp, 1 Vern. 75.

⁵ See *Post*, § 1576.

⁶ Lord Cranstown *v.* Johnston, 3 Ves. Jr. 170; Jackson *v.* Petrie, 10 Ves. 165; White *v.* Hall, 12 Ves. 321; Story on Conflict of Laws, § 544, 545; Com. Dig. Chancery, 3 X. 4 W. 27.

§ 1295. In some instances, language has been used which may be supposed to limit the jurisdiction to cases where the lands, though situate abroad, are yet within the general sovereignty of the nation exerting the equitable jurisdiction; as, for instance, suits in the Chancery of England, in regard to contracts, trusts, frauds, and other matters, touching lands in Ireland, or in the colonies of Great Britain. Lord Hardwicke, on one occasion, said, on this subject: "The different courts of equity are held under the same crown, though in different dominions; and, therefore, considering this as a court abroad, the point of jurisdiction is the same as if in Ireland. And it is certain, where the provision is in England, let the cause of suit arise in Ireland, or the plantations, if the bill be brought in England, as the defendant is here, the courts do *agere in personam*, and may, by compulsion of the person and process of the court, compel him to do justice."¹ But this language, properly interpreted, was meant to apply only to the case then before the court, which was a suit respecting matters arising in a British colony, and subjected to judicial decision there. Upon any other interpretation, it would be inconsistent with the principles upon which courts of equity profess to act in matters of jurisdiction.

§ 1296. Indeed, Lord Hardwicke himself, in another case, where a bill was brought for possession of land in Scotland, and for a discovery of the rents and profits, deeds and writings thereof, and of fraud in obtaining the deeds, asserted the jurisdiction as to the fraud and discovery, and said, that this would have been a good bill, as to fraud and discovery, if the lands had been in France, and the persons were resident here; for the jurisdiction of the court, as to frauds, is upon the conscience of the party.²

§ 1297. The same principle has been asserted by the Supreme Court of the United States, in its broadest form; and it has been held, that, in cases of fraud, of trust, or of contract, the jurisdiction of a court of equity is sustainable, wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree.³

§ 1298. Still, it must be borne in mind, that the doctrine is not without limitations and qualifications; and that, to justify the

¹ *Foster v. Vassail*, 3 Atk. 589.

² *Angus v. Angus*, 1 West, R. 23.

³ *Massie v. Watts*, 6 Cranch, 160.

exercise of the jurisdiction in cases touching lands in a foreign country, the relief sought must be of such a nature as the court is capable of administering in the given case. We have already seen, that a bill for a partition of lands in a foreign country will not be entertained in a court of equity, upon the ground that the relief cannot be given, by issuing a commission to such foreign country.¹ Perhaps a more general reason might be given, founded upon the principles of international law; and that is, that real estate cannot be transferred, or partitioned, or charged, except according to the laws of the country in which it is situated.

§ 1299. Another case, illustrative of the same qualification, may be put, which has actually passed into judgment. A bill was brought, in the English Court of Chancery, for the delivery of the possession of a moiety of land in St. Christopher's, and likewise for an account of the rents and profits thereof. Upon demurrer, it was held, that the court had no jurisdiction to put persons into possession, in a place where they had their own methods on such occasions, to which the party might have recourse; for lands in the plantations (it was said) are no more under the jurisdiction of the court than lands in Scotland; for it acts *in personam* only. But the bill, as to the rents and profits, was retained.²

§ 1300. The like decision was made in another case, already alluded to, upon a bill brought in the same court, for possession of lands in Scotland, and for a discovery of the rents and profits, deeds and writings thereof, and fraud in obtaining the deed. A plea was put in, insisting that the matter was without the jurisdiction of the court. But it was overruled; and the court said, that it could act upon the person as to the fraud and discovery.³ So, where a bequest was made for a charity to be administered in Scotland, the English Court of Chancery declined to take the administration of it into its own hands, deeming it proper to be acted on by the courts of Scotland.⁴

¹ *Ante*, § 1292; *Cartwright v. Pettus*, 2 Ch. Cas. 214; S. C. 1 Eq. Abridg. 133; *Carteret v. Petty*, 2 Swanst. R. 323.

² *Roberdeau v. Rous*, 1 Atk. 543; *Ante*, § 1295, 1296.

³ *Angus v. Angus*, 1 West. R. 23; *Ante*, § 1296.

⁴ *Provost, &c. of Edinburgh v. Auber, Ambler*, R. 236; *Attorney-General v. Lepine*, 2 Swanst. R. 182; *Emery v. Hill*, 1 Russell, R. 112; *Minet v. Vulliamy*, Id. 113, note; *Ante*, § 1184 to 1186.

CHAPTER XXXIV.

PENALTIES AND FORFEITURES.

- [* § 1301. Relief in equity against penalties and forfeitures.
- § 1302. Cases of impossibility, illegality, and repugnance.
- § 1303. At law all such contracts held void.
- § 1304. Same rule generally applies to conditions.
- § 1305. Impossible conditions, such as no human power can accomplish.
- § 1306. Void conditions, precedent, defeat the estate subsequent, estate becomes absolute.
- § 1307. Bonds dependent upon void or impossible conditions.
- § 1307 *a*. Devise to have prayers in church.
- § 1308 - 1310. Rule of the civil law upon the subject stated.
- § 1311. No relief from forfeitures of, at law.
- § 1312. Courts of equity grant relief, in such cases, in discretion.
- § 1313. Interest during the period of delay is treated as compensation.
- § 1314. Relief granted in all cases of penalty, if compensation can be made.
- § 1315. This extends to forfeitures and conditions, precedent and subsequent.
- § 1316. This is done to prevent injustice.
- § 1316 *a*. Equity will give obligee interest beyond penalty.
- § 1317. The same rules obtained in the civil law.
- § 1318. Liquidated damages enforced in equity.
- § 1319. Equity will never aid in enforcing penalties.
- § 1320, 1321. Always relieves against penalties, but not always against forfeitures.
- § 1322. Probable explanation of the distinction.
- § 1323. English courts hold forfeitures not relievable generally.
- § 1324. Equity will not interfere, unless compensation can be made.
- § 1325. Will not relieve from forfeiture, of corporation shares, for non-payment of subscription.
- § 1325 *a*. A waiver for one purpose is a waiver for all purposes.
- § 1326. Will not relieve from statutory forfeitures.
- § 1326 *a*. But will relieve from forfeitures of estate upon condition to maintain the grantee.]

[* § 1301. WE shall now consider the relief from penalties and forfeitures for non-performance of conditions and covenants, which formerly was obtainable only in courts of equity, but which is now, by statute, equally within the powers of courts of law, in most cases, both in England and America.¹

§ 1302. Generally, at common law, and equally in equity, if one fail to perform a covenant, or condition, he exposes himself to damages in the first case, and fails to secure rights dependent upon the condition in the latter.] The difficulty which arises is,

¹ See *Ante*, § 63 *a*, p. 80; *Seton v. Slade*, 7 Ves. 274.

to ascertain what shall be the effect in cases where the contract or condition is impossible to be performed, or where it is against law, or where it is repugnant in itself, or to the policy of the law.¹

§ 1303. In regard to contracts, if they stipulate to do anything against law, or against the policy of the law, or if they contain repugnant and incompatible provisions, they are treated at the common law as void; for, in the first case, the law will not tolerate any contracts, which defeat its own purposes; and, in the last case, the repugnancy renders it impossible to ascertain the intention of the parties; and, until ascertained, it would be absurd to undertake to enforce it. On the other hand, if the parties stipulate for a thing impossible to be done, and known on both sides to be so, it is treated as a void act, and as not intended by the parties to be of any validity.² But if only one party knows it to be impossible, and the other does not, and is imposed upon, the latter may compel the former to pay him damages for the imposition.³ So, if the thing is physically possible, but not physically possible for the party, still it will be binding upon him, if fairly made; for he should have weighed his own ability and strength to do it.⁴

§ 1304. In regard to conditions, they may be divided into four classes: (1.) Those which are possible at the time of their creation, but afterwards become impossible either by the act of God, or by the act of the party; (2.) Those which are impossible at the time of their creation; (3.) Those which are against law, or public policy, or are *mala in se* or *mala prohibita*; (4.) Those which are repugnant to the grant or gift, by which they are created, or to which they are annexed.⁵ The general rule of the common law in regard to conditions is, that, if they are impossible at the time

¹ See Butler's note (1) to Co. Litt. 206 *a*, and 1 Fonbl. Eq. B. 1, ch. 4, § 1, and notes (a), (b), (c).

² 1 Fonbl. Eq. B. 1, ch. 4, § 1, and note (a); Id. § 2; Id. § 3, note (r); Id. § 4, note (s); Pullerton v. Agnew, 1 Salk. 172; Com. Dig. *Condition*, D. 1.

³ Ibid.

⁴ Thornborrow v. Whiteacre, 2 Ld. Raym. 1164. A court of equity would relieve against a contract, like that in 2 Ld. Raym. 1164, and James v. Morgan, 1 Lev. R. 111, upon the ground of fraud, or imposition, or unconscionable advantage taken of the party. *Ante*, § 188, 331.

⁵ This is the classification by Mr. Butler, in his learned note (1) to Co. Litt. 206 *a*; and it is copied by Mr. Fonblanque into his note to 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (c); Id. § 3, notes (q), (r); Id. § 4, notes (s), (t), (u). See, also, Com. Dig. *Condition*, D. 1 to 8.

of their creation, or afterwards become impossible by the act of God, or of the law, or of the party, who is entitled to the benefit of them (as, for example, the feoffor of an estate, or the obligee of a bond), or if they are contrary to law, or if they are repugnant to the nature of the estate or grant, they are void. But, if they are possible at the time, and become subsequently impossible by the act of the party, who is to perform them, then he is treated as *in delicto*, and the condition is valid and obligatory upon him. But the operation of this rule will, or may, as we shall presently see, under different circumstances of its application, produce directly opposite results.¹

¹ Lord Coke's comments (Co. Litt. 206 a) on this subject are very valuable, and part of them are therefore here extracted. He begins by remarking, that there are divers diversities, which are worthy of observation; and then he adds, "First, between a condition annexed to a state in lands or tenements upon a feoffment, gift in tail, &c., and a condition of an obligation, recognizance, or such like. For, if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c., shall not be avoided. As, if a man maketh a feoffment in fee upon condition that the feoffor shall, within one year, go to the city of Paris, about the affairs of the feoffee, and presently after the feoffor dieth, so as it is impossible, by the act of God, that the condition should be performed, yet the estate of the feoffee is become absolute; for, though the condition be subsequent to the state, yet there is a precedency before the re-entry, namely, the performance of the condition. And, if the land should, by construction of law, be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed, which was made for his benefit. And it appeareth by Littleton, that it must not be to the damage of the feoffee; and so it is, if the feoffor shall appear in such a court the next term, and before the day the feoffor dieth, the estate of the feoffee is absolute. But, if a man be bound by recognizance, or bound with condition, that he shall appear the next term in such a court, and before the day of the conusee or obligor dieth, the recognizance or obligation is saved; and the reason of the diversity is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, namely, the performance of the condition. But the bond or recognizance is a thing in action, an executory, whereof no advantage can be taken, until there be a default in the obligor; and, therefore, in all cases where a condition of a bond, recognizance, &c., is possible at the time of the making of the condition, and, before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there, the obligation, &c., is saved. But, if the condition of a bond, &c., be impossible at the time of the making of the condition, the obligation, &c., is single. And so it is in case of a feoffment in fee with a condition subsequent, that is impossible, the state of the feoffee is absolute; but, if the condition precedent be impossible, no state or interest shall grow thereupon." See, also, Butler's note to Co. Litt. 206 b, 207 a; *Post*, § 1307.

§ 1305. In the view of the common law, a condition is considered as impossible, only when it cannot, by any human means, take effect; as, for example, that the obligee shall go from the church of St. Peter, at Westminster, to the church of St. Peter, at Rome, within three hours. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is then not deemed impossible.¹

§ 1306. Conditions of all these various kinds will have a very different operation, where they are conditions precedent, from what they will have where they are conditions subsequent. Thus, for example, if an estate is granted upon a condition subsequent, that is to say, to be performed after the estate is vested, and the condition is void for any of the causes above stated, there, the estate becomes absolute.² But if the condition is precedent, or to be performed before the estate vests, there, the condition being void, the estate, which depends thereon, is void also, and the grantee shall take nothing by the grant; for he hath no estate, until the condition is performed.³ Thus, if a feoffment is made to a man in fee-simple, on condition, that, unless he goes from England to Rome in twenty-four hours, or unless he marries A. before such a day, and she dies before that day, or marries the feoffor, or unless he kills another, or in case he alienes in fee, and then, and in every such case, the estate shall be void, and determine; in all these cases, the condition is void, or impossible, and being a condition subsequent, the estate is absolute in the feoffee.⁴ But if, on the other hand, a grant be made to a man, that, if he kills another, or if he goes from England to Rome within twenty-four hours, or if he marries A. before such a day, and before that day she dies, or if he does not aliene an estate before such a day, and he has already aliened it, then, and in that event, he shall have an estate in fee; in all these cases, the condition being void, or impossible, and being a condition precedent, no estate ever vests in the grantee.⁵

§ 1307. On the other hand, if a bond or other obligation be

¹ Co. Litt. 206 *a*, and Mr. Butler's note (1); Com. Dig. *Condition*, D. 2.

² 2 Black. Comm. 156, 157; Com. Dig. *Condition*, D. 1 to 4; Co. Litt. 206 *a*;

1 Fonbl. Eq. B. 1, ch. 4, § 1, note (c).

³ Ibid.; Cary v. Bertie, 2 Vern. R. 339, 340.

⁴ 2 Black. Comm. 157; Co. Litt. 206 *a*.

⁵ Ibid.

upon a condition which is impossible, illegal, or repugnant at the time when it is made, the bond is single, and the obligor is bound to pay it. But, if the condition be possible at the time when it is made, and afterwards becomes impossible by the act of God, or of the law, or of the obligee, there, the bond is saved, and the obligor is not bound to pay it.¹ So, if the condition is in the disjunctive, and gives liberty to do one thing or another, at the election of the obligor; and both are possible at the time, but one part, afterwards, by the act of God, or of the obligee, becomes impossible, the obligation is saved.² But if one part only was possible at the time, then the other part, if possible, ought to be performed.³

[* § 1307 a. And where a devise was made to the vicar of a certain parish, upon condition to read prayers, in the church, at the hour of eleven in the forenoon, upon every Wednesday forever; and that every vicar who did not observe the condition, should take no advantage from the will; it was held that the neglect upon which the devise would go over must be a wilful neglect,

¹ Com. Dig. *Condition*, 1; *Thornborrow v. Whiteacre*, 2 Ld. Raym. 1164; 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (b); *Gradon v. Hicks*, 2 Atk. 18; *Jones v. Earl of Suffolk*, 1 Bro. Ch. R. 528; Co. Litt. 206 (a); *Ante*, § 1304; 1 Roll. Abridg. 450, pl. 10; *Abbott on Shipp. Pt. 3*, ch. 11, § 3. Although the general rule seems to be, as stated in the text, that, where the condition, although possible, becomes afterwards impossible to be performed, the obligation is saved; yet it is not to be taken as universally true, either at law or in equity, that, where a covenant or contract is to be performed by a party (not secured or sought to be enforced by a penalty), and he is afterwards prevented from performing it by the act of God, or by inevitable casualty, that he is thereby exonerated from the covenant or contract, and not liable in damages for the non-performance. The contrary is certainly true in a variety of cases. But it is not easy, if, indeed, it be practicable, to reconcile all the authorities, or to say exactly in what cases the performance is excused or not. *Ante*, § 101 to 104. See *Abbott on Shipping, Pt. 3*, ch. 1, § 14 to 16 (b); *Id.* ch. 2, § 3; *Id.* Pt. 3, ch. 7, § 17, 19; *Barker v. Hodgson*, 3 Maule & Selw. 267; *Edwin v. East India Company*, 2 Vern. 210, 212; *Blight v. Page*, 3 Bos. & Pull. 295, note; *Sjoerds v. Luscombe*, 16 East, 201; *Shubrick v. Selmond*, 3 Burr. R. 1637; *Paradine v. Jane*, Aleyn, R. 27; *Brecknock Canal Company v. Pritchard*, 6 Term R. 750; *Atkinson v. Ritchie*, 10 East, R. 530; *Bullock v. Dommitt*, 6 Term R. 650; *Madeiras v. Hill*, 8 Bing. R. 231, 235. Many of the cases, on both sides, are collected in *Story on Bailm.* § 25, 35, 36, and in *Platt on Covenants*, Pl. 6, ch. 2, p. 582 to 584; and *Chitty on Contracts*, by Perkins, p. 567, 569 (Am. edit. 1839).

² Com. Dig. *Condition*, D. 1; *Laughter's case*, 5 Co. R. 21; 1 Fonbl. Eq. B. 1, ch. 4, § 3, and note (q).

³ *Ibid.*

and that a vicar who did all in his power to get a congregation together at the church to hear prayers, and could not, was not bound to tender himself every Wednesday morning, at the church, to perform the duty, in order to save the benefits of the devise.¹ A settlement upon condition that those to be benefited shall take the name and arms of the donor is well enough; but the court refused to sanction a condition that no person professing the Roman Catholic religion should take any benefit under the settlement.^{2]}

§ 1308. The Roman law, if it does not entirely coincide with the common law on the subject of conditions, is, in many respects, founded on similar considerations. If an impossible condition was annexed to a stipulation, the stipulation was, by that law, void. *Si impossibilis conditio obligationibus adjiciatur, nihil valet stipulatio.*³ *Item; quod leges fieri prohibent, si perpetuam causam (prohibitionis) servaturum est, cessat obligatio.*⁴ That rule, of course, applied to the case where the condition constituted a part of the stipulation. *Impossibilium nulla obligatio est.*⁵ Pothier states the doctrine of the civil law in the following manner. The condition of a thing impossible, unlawful, or contrary to good morals, under which one promises anything, renders the act absolutely void, when it lies infeasance (*in faciendo*) and no obligation springs from it.⁶ As, if I have promised you a sum of money upon condition that you make a triangle without angles, or that you shall go naked through the streets.⁷

§ 1309. In another place, a distinction is taken in the Roman law, approaching nearer to that in the common law. *Impossibilis conditio, cum in faciendum concipitur, stipulationibus obstat; alitur atque, si talis conditio inseratur stipulationi, si in cælum non ascenderit; nam utilis et præsens est, et pecuniam creditam continet.*⁸

¹ [* Conington's Will, *in re*, 6 Jur. N. S. 992. One might be allowed to question here, how far the testator's purpose depended upon the presence of a congregation. He might have supposed prayers not altogether idle, in the absence of hearers; and shall his purpose be frustrated?

² Williams, *in re*, 6 Jur. N. S. 1064.]

³ Inst. B. 3, tit. 20, § 11; Pothier, Pand. Lib. 45, tit. 1, n. 40, 98.

⁴ Pothier, Pand. Lib. 45, tit. 1, n. 39; Dig. Lib. 45, tit. 1, l. 35, § 1.

⁵ Dig. Lib. 50, tit. 17, l. 185.

⁶ Pothier, Oblig. n. 204.

⁷ Ibid.

⁸ Dig. Lib. 45, tit. 1, l. 7; Inst. Lib. 3, tit. 20, § 11; Pothier, Oblig. n. 204; Pothier, Pand. Lib. 45, tit. 1, n. 98.

§ 1310. A condition was accounted impossible in the Roman law, when it consisted of a thing of which nature forbids the existence. *Impossibilis autem conditio habetur, cui natura impedimento est, quominus existat.*¹ But a stipulation, which was not possible to be complied with by the party stipulating, but was possible to another person, was held obligatory. *Si ab eo stipulatus sim, qui efficere non possit, quum alii possibile sit; jure factam obligationem, Sabinus scribit.*² The same principles were still more emphatically expounded in other places in the Digest. *Non solum stipulationes impossibili conditione adplicatæ nullius momenti sunt; sed etiam cæteri quoque contractus (veluti emptiones, locationes,) impossibili conditione interpositâ, æque nullius momenti sunt. Quid in eâ re, quæ ex duorum pluriumve consensu agitur, omnium voluntas spectetur; quorum procul dubio, in hujusmodi actu talis cogitatio est, ut nihil agi existiment, apposita eâ conditione, quam sciant esse impossibilem.*³

§ 1311. From what has been already said, it is obvious, that, if a condition or covenant was possible to be performed, there was an obligation on the party, at the common law, to perform it punctiliously. If he failed so to do, it was wholly immaterial, whether the failure was by accident, or mistake, or fraud, or negligence. In either case, his responsibility dependent upon it became absolute, and his rights dependent upon it became forfeited or extinguished. Thus, for example, if a bond was made with a penalty of £ 1,000, upon condition, that, if £100 were paid to the obligee on or before a certain day it should be void, if it was not paid at the day, from any cause whatsoever, except the fault of the obligee, the obligation became single, and the obligor was compellable, at law, to pay the whole penalty. So, if an estate was conveyed upon condition, that, if a certain sum of money was paid to the grantee on or before a certain day, it should be void, (which constituted what we now call a mortgage,) if the money was not paid at the day, the estate became, (as we have seen,) at law, absolute.⁴ So, (as has already been stated,) if a sale was made of an estate, to be paid for at a particular day, if the money was not paid at the day, the right of the vendee, to

¹ Ibid.; Inst. Lib. 3, tit. 20, § 11.

² Dig. Lib. 45, tit. 1, l. 137, § 5; Pothier, Pand. Lib. 45, tit. 1, n. 39.

³ Dig. Lib. 44, tit. 7, l. 31; Pothier, Pand. Lib. 45, tit. 1, n. 98.

⁴ Ante, § 1004, 1012.

enforce a performance of the contract at law, was extinguished. On the other hand, if the vendor was unable, or neglected, at the day appointed, to make a conveyance of the estate, the sale, as to him, became utterly incapable of being enforced at law.¹

§ 1312. In such cases courts of equity grant, or refuse relief, in their discretion, and according to the circumstances of each particular case.

§ 1313. In the first place, as to relief in cases of penalties annexed to bonds and other instruments, the design of which is to secure the due fulfilment of the principal obligation.² The origin of equity jurisdiction, in cases of this sort, is certainly obscure, and not easily traced to any very exact source. It is highly probable, that relief was first granted upon the ground of accident, or mistake, or fraud, and was limited to cases where the breach of the condition was by the non-payment of money at the specified day. In such cases, courts of equity seem to have acted upon the ground, that, by compelling the obligor to pay interest during the time of his default, the obligee would be placed in the same situation, as if the principal had been paid at the proper day.³ They wholly overlooked (as has been said) the consideration, that the failure of payment at that day might be attended with mischievous consequences to the obligee, which (in a rational sense) never could be cured by any subsequent payment thereof, with the addition of interest.⁴ Upon this account, doubts have sometimes been expressed as to the solidity of the foundation, on which the doctrine of affording relief in such cases rests.⁵

§ 1314. The right to relief in equity, in cases of this character, is now well established; and the general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to

¹ *Ante*, § 771, 772, 776, 777.

² Mr. Evans, in a learned note to Pothier on Obligations (Vol. 2, Number 12, p. 81 to 111), has given a very elaborate review of the doctrine of penal obligations, to which I invite the particular attention of the reader. See, also, Newland on Contracts, ch. 17, p. 307 to 311.

³ *Reynolds v. Pitt*, 19 Ves. 140. See *Gregory v. Wilson*, 10 Eng. Law & Eq. R. 138.

⁴ *Ibid.*

⁵ *Ibid.* See *Hill v. Barclay*, 18 Ves. 58, 60.

secure the due performance thereof, or the damage really incurred by the non-performance.¹ In every such case, the true test² by which to ascertain whether relief can be had in equity is, to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere.³ If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party, upon paying the principal and interest.⁴ If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of *quantum damnificatus*; and, when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon payment of such damages.⁵

§ 1315. The same doctrine has been applied by courts of equity to cases of leases, where a forfeiture of the estate, and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent.⁶ It has also been applied to cases where a specific performance of contracts is sought to be enforced, and yet the party has not punctually performed the contract on his own

¹ *Sloman v. Walter*, 1 Bro. Ch. R. 418; 1 Fonbl. Eq. B. 1, ch. 3, § 2, note (d); *Id.* B. 1, ch. 6, § 4, note (h); *Skinner v. Dayton*, 2 Johns. Ch. R. 535; *Sanders v. Pope*, 12 Ves. 282; *Davis v. West*, 12 Ves. 475.

² *Post*, § 1320.

³ See *Carden v. Butler*, 1 Hayes & Jones, 112; *French v. Macale*, 2 Dru. & War. 269.

⁴ *Ibid.*; 2 Fonbl. Eq. B. 5, ch. 1, § 1, and notes (a), (b); *Elliott v. Turner*, 13 Simons, R. 477. See *Bowen v. Bowen*, 20 Conn. 126; *Deforest v. Bates*, 1 Edw. Ch. R. 39.

⁵ *Astley v. Weldon*, 2 Bos. & Pul. 346, 350; *Hardy v. Martin*, 1 Cox, R. 26; *Skinner v. Dayton*, 2 Johns. Ch. R. 534, 535; *Benson v. Gibson*, 3 Atk. 395; *Errington v. Aynesley*, 2 Bro. Ch. R. 343; Com. Dig. *Chancery*, 4 D. 2.

⁶ In *Hill v. Barclay* (18 Ves. 58), Lord Eldon, speaking of the relief given in cases of non-payment of rent, said: "It was upon a principle long acknowledged in this court, but utterly without foundation." — Why without foundation? It proceeds upon the intelligible principle, that the right of re-entry is intended as a mere security. If it is so intended, there is the same ground for relief, as in case of a forfeiture by non-payment of the money, due upon the mortgage, at the day appointed. Nobody doubts the justice and conscientiousness of interfering in the latter case. Why is it not equally proper in the former? See *Gregory v. Wilson*, 10 Eng. Law & Eq. R. 138.

part, but has been in default.¹ And, in cases of this sort, admitting of compensation, there is rarely any distinction allowed in courts of equity between conditions precedent and conditions subsequent; for it has been truly said, that, although the distinction between conditions precedent and conditions subsequent is known and often mentioned in courts of equity, yet the prevailing, though not the universal, distinction as to condition there is between cases where compensation can be made and cases where it cannot be made, without any regard to the fact, whether they are conditions precedent or conditions subsequent.²

¹ *Ante*, § 771 to 778; 1 Fonbl. Eq. B. 1, ch. 6, § 4, note (*h*); *Davis v. West*, 12 Ves. 475; *Sanders v. Pope*, 12 Ves. 282; *Peachy v. The Duke of Somerset*, 1 Str. 453; *Wadman v. Colcraft*, 10 Ves. 67, 70; *Hill v. Barclay*, 18 Ves. 58, 59; S. C. 16 Ves. 403, 405.

² 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (*c*); *Id.* B. 1, ch. 6, § 4, note (*h*); *Id.* ch. 6, § 5, and note (*k*); *Bertie v. Falkland*, 2 Vern. 339, 344; S. C. 1 Salk. 479; *Popham v. Bampfield*, 1 Vern. 83, and Mr. Raithby's note (1); *Hayward v. Angell*, 1 Vern. R. 223; *Grimston v. Bruce*, 1 Salk. 156; *Taylor v. Popham*, 1 Bro. Ch. R. 168; *Hollinrake v. Lister*, 1 Russ. R. 508; *Rose v. Rose*, Ambl. R. 332; *Wyllie v. Wilkes*, Doug. R. 522; *Woodman v. Blake*, 2 Vern. 221; *Cage v. Russell*, 2 Vent. R. 352; *Wallis v. Crimes*, 1 Ch. Cas. 89. — There is some diversity in the cases upon the subject of conditions precedent and conditions subsequent, as acted upon in chancery. Thus, for example, it was said in *Popham v. Bampfield* (1 Vern. 83) that there was a difference between conditions precedent and conditions subsequent: "For precedent conditions must be literally performed; and this court (a court of equity) will never vest an estate where, by reason of a condition precedent, it will not vest at law. But of conditions subsequent, which are to divest an estate, it is otherwise. Yet, of conditions subsequent, there is this difference to be observed; for, against all conditions subsequent, this court (of equity) cannot, nor ought, to relieve. When the court can, in any case, compensate the party in damages, for the non-precise performance of the condition, there it is just and equitable to relieve. In the case of *Hayward v. Angell* (1 Vern. R. 223), the Lord-Keeper said: "In all cases, where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief." In *Cary v. Bertie* (2 Vern. R. 339), Lord Holt, assisting the Lord Chancellor, said: "In cases of conditions subsequent, that are to defeat an estate, these are not favored in law; and, if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited. And a court of equity may relieve to prevent the divesting of an estate; but cannot relieve to give an estate that never vested." The Lord Chancellor, in the same case, said: "As the condition was the performance of a collateral act, and did not lie in compensation, he did not see anything that could be a just ground for relief in a court of equity." *Id.* p. 344; S. C. 1 Salk. 231. We shall presently see, that in some cases of forfeiture for breach of covenant, courts of equity will not grant relief upon the principle that compensation can be made. In *Wallace v. Crimes* (1 Ch. Cas. 90),

§ 1316. The true foundation of the relief in equity in all these cases is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to.¹ And, notwithstanding the objections, which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act, (the real object of the parties being the performance of the act,) that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said, that it is his own folly to have made such a stipulation, it may equally well be said, that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground, that a party, having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury.²

the Lord-Keeper decided, that, wherever a condition precedent was in the nature of a penalty, equity ought to relieve. See, also, *Bland v. Middleton*, 2 Ch. Cas. 1.

¹ *Skinner v. Dayton*, 2 Johns. Ch. R. 535; *Peachy v. The Duke of Somerset*, 1 Str. 447, 453; 1 Fonbl. Eq. B. 1, ch. 6, § 4, note (h).

² See Newland on Contracts, ch. 17, p. 307 to 311. Lord Eldon has taken uncommon pains to express his dissatisfaction with the principle of allowing relief in equity against penalties and forfeitures, and also of the dispensation with a punctilious performance of contracts by courts of equity. In *Hill v. Barclay*, 18 Ves.

§ 1316 *a*. The same principle of general justice is applied in favor of the party entitled to the security of the penalty, wher-

59, 60, he used the following language: "The original cases upon this subject are of different sorts. The court has very long held, in a great variety of classes of cases, that, in the instance of a covenant to pay a sum of money, the court so clearly sees, or rather fancies, the amount of damage, arising from non-payment at the time stipulated, that it takes upon itself to act, as if it was certain, that, giving the money five years afterwards with interest, it gives a complete compensation. That doctrine has been recognized, without any doubt, upon leases, with reference to non-payment of rent; upon conditions precedent, as to acts to be done; payment of money in cases of specific performance, and various other instances. But the court has certainly affected to justify that right, which it has assumed, to set aside the legal contracts of men, dispensing with the actual specific performance, upon the notion that it places them, as near as can be, in the same situation, as if the contract had been with the utmost precision specifically performed. Yet the result of experience is, that, where a man, having contracted to sell his estate, is placed in this situation, that he cannot know whether he is to receive the price, when it ought to be paid, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation." — See also S. C. 16 Ves. 403, 405. The whole argument of Lord Eldon is, that courts of equity decree what they presume is a compensation, but what, in a given case, may be no just compensation. Now, in the first place, this is no objection to any interference in all cases, where a complete and adequate compensation can be given; but only to an interference, where the facts establish that there cannot be such a complete and adequate compensation. And this is the very exception, which, theoretically, at least, courts of equity adopt. In the next place, it is supposed by Lord Eldon (*Reynolds v. Pitt*, 19 Ves. 140), that interest for the delay of payment of money is not, or may not, be an adequate compensation for the omission to pay at the time appointed. That objection equally applies to the allowance of interest at law, as a compensation. It may, in a given case, be inadequate to the particular loss sustained by the creditor. Yet it is uniformly acted upon, without hesitation; and the creditor will not be permitted to recover a greater compensation. The reason is, that interest is a certain and general rule adapted to ordinary circumstances. And it would be inconvenient to go into a particular examination of all the circumstances of each case, in order to ascertain the loss or injury. The general rule of interest is adopted, because it meets the ordinary grievance, and compensates for it. All general rules must work occasional mischiefs. Besides, there would be injustice in compelling a debtor to pay losses of a collateral nature, not embraced in, or connected with his own contract, over which he could have no control, and which might be imputable to the rashness, or improvidence, or want of skill, of his creditor. No system of laws could provide for all the remote consequences of the non-performance of any act. Human justice must stop, as it ought, at the direct, and immediate, and necessary consequences of acts and omissions, and not aim beyond a reasonable indemnification for them. At least, the common law of England, equally with equity, has adopted this as the basis of its usual remedial justice.

ever the other party has unreasonably deprived him of his right to enforce it, until it is no longer adequate to secure his rights. Hence it is, that courts of equity will decree the obligee of a bond interest beyond the penalty of the bond, where, by unfounded and protracted litigation, the obligor has prevented the obligee from prosecuting his claim at law for a length of time, which has deprived the latter of his legal rights, when they might otherwise have been made available at law. In such cases courts of equity do no more than supply and administer, within their own jurisdiction, a substitute for the original legal rights of the obligee, of which he has been unjustifiably deprived by the misconduct of the obligor.¹ So, if a mortgagor has given a bond with a penalty, as well as a mortgage for the security of a debt, although the creditor suing on the bond can recover no more than the penalty, even when the interest due thereon exceeds it; yet, if he sues on the mortgage, courts of equity will decree him all the interest due upon the debt, although it exceeds the penalty; for the bond is but a collateral security.² And, in such a case, it will not make any difference, that the mortgage is given by a surety.³

§ 1317. It is not improbable that courts of equity adopted this doctrine of relief, in cases of penalties and forfeitures, from the Roman law, where it is found regularly unfolded, and sustained upon the clear principles of natural justice. The Roman law took notice, not only of conditions, strictly so called, but also of clauses of nullity and penal clauses. The former were those, in which it was agreed that a covenant should be null or void in a certain event; the latter were those where a penalty was added to a contract for non-performance of that which was stipulated.⁴ The general doctrine of that law was, that clauses of nullity and penal clauses were not to be executed according to the rigor of their terms. And, therefore, covenants were not of course dissolved, nor forfeitures or penalties positively incurred, if there was not a punctilious performance at the very time fixed by the contract. But the matter might be required to be submitted to the discretion of the proper judicial tribunal to decide upon it according to

¹ *The East India Company v. Campion*, 11 Bligh, R. 159, 187, 188. See also *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. R. 598; S. C. 3 Sim. R. 340; *Duval v. Terrey*, Shower, Parl. Cas. 15; *Hale v. Thomas*, 1 Vern. R. 349, 350; *Peers v. Baldwin*, 2 Eq. Abridg. 611; *Post*, § 1522.

² *Clark v. Lord Abingdon*, 17 Ves. 106.

^{*} *Ibid.*

⁴ 1 Domat, B. 1, tit. 1, § 4, art. 18, p. 50, 51.

all the circumstances of the case, and the nature and objects of the clauses.¹ Indeed, penalties were in that law treated altogether, as in reason and justice they ought to be, as a mere security for the performance of the principal obligation.²

§ 1318. But we are carefully to distinguish between cases of penalties strictly so called, and cases of liquidated damages. The latter properly occur, when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum, as the just, appropriate, and conventional amount of the damages sustained by such act or omission. In cases of this sort, courts of equity will not interfere to grant relief; but will deem the parties entitled to fix their own measure of damages;³ provided always that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury. But, on the other hand, courts of equity will not suffer their jurisdiction to be evaded merely by the fact, that the parties have called a sum damages, which is, in fact and in intent, a penalty;⁴ or because they have designedly used language and inserted provisions, which are in their nature penal, and yet have endeavored to cover up their objects under other disguises. The principal difficulty in cases of this sort is to ascertain when the sum stated is in fact designed to be *nomine pænæ*, and, when it is properly designed as liquidated damages.⁵

§ 1319. It is a universal rule in equity, never to enforce either a penalty or a forfeiture.⁶ Therefore, courts of equity will never

¹ Domat, B. 1, tit. 1, § 4, art. 19, p. 51; Dig. Lib. 45, tit. 1, l. 135, § 2; Id. l. 122; Pothier, Oblig. n. 345, 349, 350.

² Pothier, Oblig. n. 341, 342, 345.

³ Skinner v. White, 17 Johns. R. 369.

⁴ See, as to liquidated damages and penalties, Beal v. Hayes, 5 Sandf. 640; Id. 192; Carpenter v. Lockhart, 1 Carter, 460; Westerman v. Means, 12 Penn. St. R. 97; Van Buren v. Digges, 11 How. 461; Munday v. Culver, 18 Barb. 336; Hosmer v. True, 19 Barb. 106; Williams v. Green, 14 Ark. 515.

⁵ Lowe v. Peers, 4 Burr. 22, 25; Astley v. Weldon, 2 Bos. & Pull. 346; Skinner v. Dayton, 2 Johns. Ch. R. 535; 1 Fonbl. Eq. B. 1, ch. 3, § 2, note (d). Many of the cases are collected in Mr. Evans's note to Pothier on Obligations (Vol. 2, No. 12, p. 85 to 98). See also Jeremy on Eq. Jurisd. B. 1, Pt. 2, ch. 4, § 3, p. 477, 478; Eden on Injunct. ch. 2, p. 21, and note (e); Shiel v. McNett, 9 Paige, 101.

⁶ Livingston v. Tompkins, 4 Johns. Ch. R. 431; Popham v. Bampffield, 1 Vern. 83; Carey v. Bertie, 2 Vern. R. 339; Ante, § 1315, note (1); 1 Fonbl. Eq. B. 1, ch. 6, § 5; Horsburg v. Baker, 1 Peters, R. 232, 236.

aid in the divesting of an estate, for a breach of a covenant, on a condition subsequent;¹ although they will often interfere to prevent the divesting of an estate, for a breach of covenant or condition.²

§ 1320. But there seems to be a distinction taken, in equity, between penalties and forfeitures. In the former, relief is always given, if compensation can be made; for it is deemed a mere security.³ In the latter, although compensation can be made, relief is not always given. It is true, that the rule has been often laid down, and was formerly so held, that, in all cases of penalties and forfeitures, (at least upon a condition subsequent,) courts of equity would relieve against the breach of the condition and the forfeiture, if compensation could be made, even although the act or omission was voluntary.⁴ The same doctrine was formerly applied in many cases of conditions precedent, where the parties could be put in the same situation as if they had been strictly performed.⁵

§ 1321. But the doctrine at present maintained seems far more narrow. It is admitted, indeed, that, where the condition or forfeiture is merely a security for the non-payment of money, (such as a right of re-entry upon non-payment of rent,) there it is to be treated as a mere security, and in the nature of a penalty, and is accordingly relievable.⁶ But, if the forfeiture arises from the breach of any other covenants of a collateral nature; as, for example, of a covenant to repair; there, although compensation might be ascertained and made upon an issue *quantum damnificatus*, yet it has been held that courts of equity ought not to relieve, but should leave the parties to their remedy at law.⁷

¹ Ibid.

² Ibid.

³ *Ante*, § 1314.

⁴ *Ante*, § 1315, note (1); *Popham v. Bampffield*, 1 Vern. 33; *Hayward v. Angell*, 1 Vern. R. 222; *Northcote v. Duke, Ambler*, R. 513; 1 Fonbl. Eq. B. 1, ch. 6, § 4, and note (g); *Sanders v. Pope*, 12 Ves. 289; *Cage v. Russell*, 2 Vent. 352; *Wafer v. Mocato*, 9 Mod. R. 112; *Hack v. Leonard*, 9 Mod. R. 91; Com. Dig. *Chancery*, 3 L.

⁵ See *Taylor v. Popham*, 1 Bro. Ch. R. 168; *Hollinrake v. Lister*, 1 Russ. R. 508; Com. Dig. *Chancery*, 2 Q. 4, 7, 8.

⁶ *Ante*, § 1315, and note (2); *Hill v. Barclay*, 16 Ves. 403, 405; S. C. 18 Ves. 58, 60; *Wadman v. Calcraft*, 10 Ves. 68, 69; *Reynolds v. Pitt*, 19 Ves. 140.

⁷ *Wadman v. Calcraft*, 10 Ves. 68, 69; *Hill v. Barclay*, 16 Ves. 403, 405; S. C. 18 Ves. 59, 60, 61; *Reynolds v. Pitt*, 19 Ves. 140, 141; *Bracebridge v. Buckley*, 2 Price, R. 200; *Green v. Bridges*, 4 Sim. 96. The contrary doctrine was maintained in *Hack v. Leonard*, 9 Mod. R. 91; and *Webber v. Smith*, 2 Vern. R. 103. And see *Gregory v. Wilson*, 10 Eng. Law & Eq. R. 103.

§ 1322. It is not, perhaps, very easy to see the grounds of this distinction between these two classes of cases. It is rather stating the distinction than the reason of it, to assert, that, in the one case, the amount of damages by the non-payment of the rent is certain and fixed; in the other case, the damages are uncertain and unliquidated. But, in the case of a penalty, such a distinction is wholly repudiated; because the penalty is treated as a security. The forfeiture is also treated as a security, in cases of non-payment of rent. And in other cases of covenant, if the damages are capable of being ascertained by a jury, and will, in a legal and equitable sense, be an adequate compensation, the reason is not very clear why, under such circumstances, the forfeiture may not be equally treated as a security for such damages. The most probable ground for the distinction is, what has been judiciously hinted at, that it is a dangerous jurisdiction; that very little information upon it can be collected from the ancient cases, and scarcely any from those in modern times; that it was originally adopted in cases of penalties and forfeitures, for the breach of pecuniary covenants and conditions, upon unsound principles; and therefore, that it ought not to be extended, as it rarely works real compensation, or places the parties upon an equality and mutuality of rights and remedies.¹ It has been further insisted, that the authorities do not bear out the proposition, that courts of equity will, in cases of forfeiture, for the breach of any covenant, give relief upon the principle of compensation.²

§ 1323. Indeed, the doctrine seems now to be asserted in England, that, in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensa-

¹ See the opinions expressed by Lord Eldon in *Wadham v. Calcraft*, 10 Ves. 67; *Hill v. Barclay*, 16 Ves. 403, 405; S. C. 18 Ves. 58 to 64; *Reynolds v. Pitt*, 19 Ves. 140, 141; *Ex parte Vaughan*, 1 Turn. & Russ. 434. Mr. Baron Wood's opinion in *Bracebridge v. Buckley*, 2 Price R. 200, contains the reasons for the opposite doctrine, which are well worthy of consideration. Mr. Chancellor Kent, in *Skinner v. Dayton*, 2 Johns. Ch. R. 535, seems to have held the same doctrine as Mr. Baron Wood. See also *Livingston v. Tompkins*, 4 Johns. Ch. R. 431; 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (c); Id. ch. 6, § 4, notes (g) and (h); Id. § 5, note (k); *Keating v. Sparrow*, 1 B. & Beat. 373, 374; *Eden on Injunct.* ch. 2, p. 21 to 26; *Com. Dig. Chancery*, 2 Q. 3 to 5, 8, 9.

² *White v. Warner*, 2 Meriv. R. 459.

tion.¹ And the same rule is applied to cases where there is not only a clause for re-entry, in case of non-payment of rent, but also a proviso, that, if the rent is not duly paid, the lease shall be void ; for the construction put in equity upon this latter clause is that it is a mere security for the payment of the rent.² Indeed, a strong inclination has been exhibited, even in the courts of law, to construe such a proviso, to make the lease voidable, and not absolutely void, so as to make any subsequent receipt of rent, or other act affirming the lease, to be a confirmation thereof.³ Whether

¹ *Eaton v. Lyon*, 3 Ves. 692, 693; *Bracebridge v. Buckley*, 2 Price, R. 200; *Hill v. Barclay*, 16 Ves. 403, 405; S. C. 18 Ves. 58 to 64; *Rolfe v. Harris*, 2 Price, R. 206, note; *White v. Warner*, 2 Meriv. R. 459; *Eden on Injunct.* ch. 2, p. 22, 23, and Mr. Eden's note to *Northcote v. Duke*, 2 Eden R. 322; *Com. Dig. Chancery*, 2 Q. 2 to 4.

² *Bowser v. Colby*, 1 Hare, Ch. R. 109, 130; *Horne v. Thompson*, 1 Sausse & Scully, 615.

³ *Ibid.*; *Arnsby v. Woodward*, 6 Barn. & Cressw. 519; *Rede v. Farr*, 6 M. & Selw. 121. In *Bowser v. Colby*, 1 Hare, Ch. R. 109, 128, 130 to 132, this whole subject was examined with great ability, by Mr. Vice-Chancellor Wigram. On that occasion he said: "The next point taken was, that there are two different species of provisos in leases; in some, a common clause of re-entry on non-payment of rent, thereby determining the lease, and nothing more; in others, a proviso declaring, that if the rent is not paid, the lease shall be void; and there being, in this case, a proviso, 'that the lease shall become absolutely void,' it is said, that there is now nothing for the court to act upon, — no lease existing which it can restore to the tenant, and, therefore, that the court will not interfere. If it could have been shown that a court of equity gave relief only before the landlord had entered, the argument might have been well founded, but inasmuch as, in most of the cases, relief has been given upon bills filed after the landlord has entered, the argument must be fallacious; for, when the landlord has entered, the lease is equally at an end in a court of law, whether there is a proviso for re-entry simply, or a proviso that it is to be void, on non-payment of rent. It is said, however, that the contract of the parties is different, — that, where it is declared that the lease shall become absolutely void on non-payment of the rent, the true construction is, that the parties mean the lease shall, in fact, be at an end, and no relief shall be given against the consequence of the non-payment of rent. I can, by no means, accede to this construction. The legal effect in one case is, that, if the landlord re-enters, the lease is determined, — in the other case, it is determined without his re-entry. The contract of the parties is, that in one case, the lease shall not be at an end by the mere non-payment of rent, unless the landlord shall re-enter, and then that it shall be at an end; and, in the other case, that the non-payment of rent alone shall determine the lease. In both cases the same consequence is to follow, though from different acts. In both the contract is the same, in this sense, that there are certain acts to take place, which are to determine the lease altogether. The indenture of demise, in this case, after the covenants for payment of rent, — rendering the accounts, — and against the demise or

this narrow limitation of the doctrine is defensible upon the original principles which seem to have guided courts of equity in inter-assignment of the premises, provides, that if the lessee should not pay the reserved rents within a given time, or should make default in the performance of the other covenants on his part, or should become insolvent, or the term should be taken in execution, then it shall be lawful for the lessor to re-enter upon and repossess the premises as in his former estate, and to expel the lessee. If the proviso had ended here, it would have been no more than the common power of re-entry in the case of a breach of covenant; and, if the landlord entered under this power, the legal consequence would follow, that the lease would become, to all intents and purposes, forfeited, and the term would be void. The remainder of the proviso, that 'the lease, as to the term hereby granted, shall in that case be forfeited, and the same term shall cease, and determine, and be utterly null and void, as if the same had never been made and created,' expresses nothing more than what the law itself would imply if those words had not been found there. It appears, from the case of *Taylor v. Knight*, and from Lord Eldon's observations in *Hill v. Barclay*, that the court formerly used to consider (the lease being gone, at law, by the re-entry) that the only way it could give relief was by creating a new lease, until the statute, recognizing the right of the tenant to be relieved, dispensed with that form of relief, and declared that the last lease should be deemed to have continuance. The analogy to the case of mortgages fortifies the same reasoning. The object of the proviso in both cases is, to secure to the landlord the payment of his rent; and the principle of the court is, — whether right or wrong is not the question, — that, if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid upon the prescribed day. It is not, however, necessary, that I should pronounce any opinion upon the case of a lease being absolutely void; for in this case, I think it was voidable only. The most recent case I have been able to find on the subject is a case of *Arnsby v. Woodward*. A lease had been granted, with a proviso, that, if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof as should be then unexpired, 'should cease, determine, and be utterly void, and it should be lawful to and for' the landlord 'upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel' the lessee. There the declaration, that the lease shall be void by the non-payment, precedes the power of re-entry, a consequence of law, which of course attaches to the forfeiture of the lease. In this case, the clause of re-entry comes first, and the declaration of the legal consequences follows. In that case, *Doe v. Bancks*, and another case of *Rede v. Farr*, were cited; and Lord Tenterden, holding that, notwithstanding those clear words, making it void, the acceptance of subsequent rent would keep the lease alive, said, that, taking the two clauses together, the sound construction of them gave to the landlord a right to re-enter, to be exercised or not, at his election; otherwise, the latter clause, 'it shall be lawful to re-enter,' would have no effect. He had no difficulty, except that the words which declared the lease void preceded the common power to enter; but, if he might transpose those words, and put the right to re-enter first, there would be no difficulty, because the other would be a mere legal consequence. This is a strong case, when it is considered that all the old cases went to show that

fering in cases of penalties and forfeitures, namely, that they are to be treated as mere securities for the performance of stipulated acts, and not strictly as conditions to limit and determine rights and estates, *ex rigore juris*, according to the common law, may, perhaps, admit of serious question.¹ But, in the present state of the authorities, this restricted doctrine may be affirmed to possess a general, if not a conclusive weight in the English courts of equity. Perhaps in America the doctrine would be received with more hesitation; and it has been held, in a contract for the sale of land, reserving to the vendor a right to hold the contract forfeited, if the vendee should make default in due payment of the purchase-money, that the vendor was not at liberty to enforce the forfeiture suddenly, without previous notice to the vendee; and, that any receipt of a part of the purchase-money, after default of due payment, will, or at least may, amount to a waiver of the forfeiture.² This seems to proceed upon the general ground that such a reservation is but a mere security for the purchase-money.

§ 1324. Be this as it may, it is clearly established, that courts of equity will not interfere, in cases of forfeiture for the breach of covenants and conditions, where there cannot be any just compensation decreed for the breach.³ Thus, for example, in the case of a forfeiture for the breach of a covenant, not to assign a

where the construction of the proviso made the lease actually void, no acceptance of rent could set up a term, which had ceased by the very contract of the parties. I do not mean to give any opinion of what, in abstract cases, would be the difference in a court of equity between the effect of the common power of re-entry, and a clause that the lease shall be void. It is not difficult to suggest circumstances in which the court might give no relief, where the lease was to be void; as, for example, if the landlord sought the assistance of the court to give effect to the forfeiture. I found myself upon the construction of the words in the proviso now before me, in which construction I am supported by the judgment of the Court of Queen's Bench, in *Arnsby v. Woodward*. I consider it, in effect, only a clause for re-entry, and the case is, therefore, in that view, one in which a court of equity is enabled to give relief." See also *Harris v. Troup*, 8 Paige, R. 423.

¹ Suppose a mortgage were made upon a condition to perform certain covenants, and, among other things, a covenant to repair; and there should be a breach of the covenant; would a court of equity refuse to allow the mortgagor to redeem, upon making full compensation? In the case of a bond, with condition to repair, would a court of equity refuse, after a breach to interfere, to prevent the recovery of the penalty, if compensation could be made?

² *Harris v. Troup*, 8 Paige, R. 425.

³ See *Dunkler v. Adams*, 20 Vermont, 415; *Wells v. Smith*, 2 Edw. Ch. R. 226.

lease without license, or to keep leasehold premises insured, or to renew a lease within a given time, no relief will be given; for they admit of no just compensation or clear estimate of damages.¹

§ 1325. It is upon grounds somewhat similar, aided also by considerations of public policy, and the necessity of a prompt performance, in order to accomplish public or corporate objects, that courts of equity, in cases of the non-compliance by stockholders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture.² The same rule is, for the

¹ *Grimstone v. Lord Bruce et ux.* 1 Salk. 156; 2 Vern. R. 594; *Wafer v. Mocato*, 9 Mod. R. 112; *Lovat v. Lord Ranelagh*, 3 V. & Beam. 24; *Rolfe v. Harris*, 2 Price, R. 206, n.; *White v. Warner*, 2 Meriv. R. 459; 1 Fonbl. Eq. B. 1, ch. 6, § 12, and note (c); *City of London v. Mitford*, 14 Ves. 58; *Reynolds v. Pitt*, 19 Ves. 134; *Com. Dig. Chancery*, 2 Q. 3, 8 to 10.

² *Sparks v. Proprietors of Liverpool Water Works*, 13 Ves. 433, 434; *Prendergast v. Turton*, 1 Younge & Coll. New R. 98, 110 to 112. This case was a mining concern, and, by one of the regulations, if any instalments called for were not punctually paid, the shares should be forfeited as well as the prior instalments, which had been paid. The directors had declared the shares of the plaintiff forfeited. The bill was brought to reinstate the plaintiff in his rights. On this occasion Mr. Vice-Chancellor Bruce said: "The point, which has struck me from the beginning (and upon which everything that could be said has been said by counsel), is the time at which the suit has been instituted, having regard to the peculiar nature of the property, and the circumstances of the case. This is a mineral property, — a property, therefore, of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing, perhaps, a considerable amount of profit in one year, and losing it the next. It requires, and of all properties perhaps the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord Eldon, is consonant with reason and justice. Lord Eldon always acted upon it, and has been followed by subsequent judges of great knowledge, experience, and eminence. Now, in the present case, conceding, for the sake of argument, that the shareholders could not be compelled to contribute beyond £50 a share, and did no wrong in declining to make advances beyond that sum, yet the result of all the circumstances of this case appears to have been, that the mine could not be carried on without further outlay. The plaintiffs objected to this further outlay; and then a considerable discussion ensued, which was substantially concluded in 1828. Some subsequent letters were written, but they did not, I think, materially vary that state of the case. The residence of the plaintiffs was occasionally in Jersey and occasionally in England; but they never appear to have been absent from the Queen's dominions. In this state of things, the concern not improving, and the plaintiff and Miss Kent refusing to contribute to its necessities beyond the amount already stated, some parties are found who are willing

same reasons, applied to cases of subscription to government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan, as to the time, and mode, and place of payment.¹

[* § 1325 a. And the same rule applies to other contracts generally, no doubt. But where the party, (or his agent,) who is entitled to the benefit of the forfeiture, has waived such benefit, and treated the contract as still subsisting for some purposes, he will not be allowed to insist upon the forfeiture for any purpose. As, where a life-policy was subject to a condition making it void if the assured went beyond the limits of Europe, without license; and an assignee of the policy, on paying the premium to a local agent of the company, at the place where the insurance had been effected, informed him that the assured was resident in Canada, but the agent stated that this would not avoid the policy, and received the premiums until the assured died; it was held that the company was precluded from insisting on the forfeiture.²]

to stem the difficulties and incur the hazard; and, from this period, through several years, down to 1835, they venture to carry on the concern. In 1836, affairs begin to look better, and the mine, whether legally or illegally, wisely or unwisely, is, in that year, new modelled, and the shareholders are turned into what is called scrip-holders. Matters go on in this manner in 1836 and 1837, and it was not till November, 1837, when the result of the struggle had appeared, that after a profit had been made by the unassisted efforts of those who still adhered to the speculation, the plaintiff and Miss Kent applied for and claimed their shares. Negotiations were then set on foot, demands and refusals took place in the ordinary way, and it was not till September, 1838, that the bill was filed; but the demand may be taken as made in 1837. I was anxious, being impressed very much with Mr. Simpkinson's opening of the case, as it related to the conduct of the directors, to have the time, which so elapsed, in some way accounted for, — to have the chasm between the years 1828 and 1837 in some manner filled up, — to have the conduct of the plaintiffs, during that time, in some measure explained, — to have the case placed in a position upon which the court could fasten itself, in order to give the plaintiffs that property which they might have been entitled to, had they presented themselves here in due time. But I am unable to find the means of doing this. Here is a mineral property, the subject of great uncertainty and fluctuation. After its character has been established with much difficulty, after a period of nine years, during which they rendered no assistance to the concern, a claim is brought forward by those who are now willing to share in its prosperity. It appears to me, that, although this is a case to be decided in equity only, and at the hearing, and not on any interlocutory motion, it is impossible to say (consistently with my views of what are the principles of this court) that the plaintiffs can be assisted."

¹ Ibid.

² [* *Wing v. Harvey*, 5 De G. M. & G. 265.]

§ 1326. Where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will.¹ The same principle is generally (perhaps not universally) applied to cases of forfeiture founded upon the customs of manors, and the general customs of certain kinds of estates, such as copyholds; for, in all these cases, the forfeiture is treated as properly founded upon some positive law, or some customary regulations, which had their origin in sound public policy, and ought to be enforced for the general benefit.²

[* § 1326 *a*. In a recent case,³ where the subject is a good deal discussed, and the authorities carefully canvassed, it was held, that where a deed was conditioned for the performance of a covenant for the maintenance of the grantee, equity will relieve the grantor from a forfeiture, which was accidental, or at least unintentional, and not attended with irreparable injury to the grantee; but that it rested in the discretion of the court when relief should be granted in this class of cases.⁴ Such a deed is regarded as a mortgage⁵ in equity, if not strictly so in form.⁶

¹ *Peachy v. Duke of Somerset*, 1 Str. R. 447, 452 to 455; *Keating v. Sparrow*, 1 B. & Beatt. 373, 374.

² *Peachy v. Duke of Somerset*, 1 Str. R. 447, 452; S. C. Prec. Ch. 568, 570, 574. But see *Nash v. Earl of Derby*, 2 Vern. 537, and Mr. Raithby's note (1); *Thomas v. Porter*, 1 Ch. Cas. 95; *Hill v. Barclay*, 18 Ves. 64.

³ [* *Henry v. Tupper*, 29 Verm. R. 358; *Dunklee v. Adams*, 20 Verm. R. 421.

⁴ In giving the opinion in the case of *Henry v. Tupper*, it was said: "But equity, as a general thing, will relieve the party from such a forfeiture. It will do it in all cases, it is said, where compensation can be made. 2 Greenl. Cruise, 36, § 29.

"Chancellor Kent lays down the rule in regard to relief in such cases, that it is confined to cases where the forfeiture has been the effect of accident, and the injury is capable of compensation; *Livingston v. Tompkins*, 4 Johns. Ch. 431, citing *Rolfe v. Harris*, 2 Price, 207, note; *Bracebridge v. Buckley*, 2 Price, 200; and this seems to be putting the matter upon reasonable grounds.

"But if the matter is really capable of compensation, it is more doubtful, perhaps, whether the cases will warrant any denial of relief, upon the ground that

⁵ *Austin v. Austin*, 9 Verm. R. 420; *Lanfair v. Lanfair*, 18 Pick. R. 299; Opinion of the court, in *Henry v. Tupper*, 29 Verm. R. 371, where it is said: "The deed seems to us to be substantially a mortgage. It is a deed subject to defeasance by the fulfilment of a condition subsequent. And that is all there is in any mortgage."]

⁶ *Ibid*.

the forfeiture was not the result of accident. It is certain no such thing is required to be shown in the naked case of a pecuniary debt. The non-payment may be wilful, and the party is still entitled to relief, as matter of right. But the case of *Dunklee v. Adams* seems to have settled the question in this State, that relief for non-performance of collateral duties is matter of discretion in the courts of equity, to be judged of according to the circumstances of each particular case.

“And in *Hill v. Barclay*, 18 Vesey, 56, which is a very elaborate case upon this point, although the chancellor, Lord Eldon, says a great deal about the difficulty of making compensation, in money cases even, and shows very clearly that the payment of money and interest, in most cases, is no compensation for not having it when due, and so shows pretty conclusively, I think, that there is no settled principle in the books in regard to what cases the court will relieve from forfeiture, and what cases they will not; and that, after all, it does not depend so much upon the difficulty of making compensation as upon other circumstances often; yet Lord Eldon says, if the covenantee offers to overlook the forfeiture, there would seem to be no difficulty in allowing subsequent performance of a specific act, as making repairs. But ‘if the tenant still refused, upon what ground,’ asks his lordship, ‘having wilfully refused and violated all his covenants, could he desire a court of equity to place him in exactly the same situation as if he had performed them?’ And this point of wilful neglect and non-performance is many times referred to in that case as an invincible obstacle to relief. These two points seem to me to have been very generally mixed up, most inextricably, in the equity decisions upon the subject. In cases where the condition is for the payment of money, or for the performing of a certain value of services, expressed in currency, as one hundred dollars of necessary repairs upon buildings leased, it has been, I think, the more general practice of the court to grant relief, as matter of right, without reference to the inquiry whether the default was accidental or wilful. But in all cases where the thing to be done was something collateral, where the issue *quantum damnificatus*, must be sent, either to a jury, or masters, before the court could grant relief, they have pretty generally, I think, required to be satisfied that the omission to perform was not wilful, but accidental; and by surprise; and it has been held always in such cases to depend very much upon the circumstances of the particular case. That relief might be granted in equity, even where the condition was for the performance of collateral acts, seems to be admitted in most of the cases upon this subject; *Webber v. Smith*, 2 Vernon, 103; *Hack v. Leonard*, 9 Mod. 90; *Cox v. Higford*, 2 Vernon, 664; *Sanders v. Pope*, 12 Vesey, 282. These are cases of non-repair of premises leased; and the chancellor, Lord Erskine, says in the last case, ‘I cannot agree it is necessary the non-performance of the covenant should have arisen from mere accident or ignorance.’ The cases are abundant where relief has been granted against forfeiture of title by non-performance of other collateral acts, as for not renewing a lease; *Rawstorne v. Bentley*, 4 Br. C. C. 415; or for cutting down timber when covenanted against, on pain of forfeiture. *Northcote v. Duke*, Ambler, 511; *Thomas v. Porter*, 1 Ch. Cas. 95. But it has been held, relief will not be granted where the forfeiture arises from an act incapable of compensation, although of no essential damage to the other party, as the breach of a condition not to assign; *Wafer*

v. Mocato, 9 Mod. 112. The same rule obtains where the forfeiture arises from an omission to insure; *Rolfe v. Harris*, 2 Price, 206.

"It seems, however, to be pretty well established in England, that relief for non-repair of premises will not be granted as matter of course, and especially when there was a wilful default; *Bracebridge v. Buckley*, 2 Price, 200; *Hill v. Barclay*, 16 Vesey, 402, and 18 Id. 56. But where the failure is from 'accident, fraud, surprise, or ignorance, not wilful,' relief will be granted; 2 Lead. Cas. in Equity, 464, 465; *Eaton v. Lyon*, 3 Vesey, 693; the result of all which seems to be, that there is no well-settled rule upon the subject, or none which is not liable to considerable variation, and to be affected by the circumstances of the particular case.

"It certainly cannot be maintained, from the authorities, that relief is, in all cases, limited to the non-payment of money. Nor is there any principle whereby it can be made to appear that such cases are the only ones where compensation can be made. Many collateral duties are just as susceptible of compensation as a covenant to pay money; as undertakings to deliver goods, to repair premises, or to afford support even; for in all these cases the non-performance, at the time, is not fully compensated by the payment of the same value and interest at an after-time. The non-payment of a sum of money, at a particular time, may, under circumstances, be one's ruin, and at others it may be a positive benefit, if the interest be subsequently paid; and so of any collateral duty. And in regard to this support, it is no doubt capable of being stated in strong terms, and quite consistent with supposable emergencies. But the case would not be different, in fact or in principle, if it was a stipendiary sum in money, for the purposes of support either in fact or in terms expressed in the contract.

"But the apprehension that this equitable relief shall be absolutely confined to cases of pecuniary debts is certainly presenting a very shortened view of the range of equitable principles. Such a limit, to be held absolutely binding in all cases, would certainly look like an evasion of just and reasonable discretion.

"But we must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection than in the ordinary cases of collateral duties.

"And although we are not prepared to say that it must appear that in all cases the failure arises from surprise, or accident, or mistake, we certainly should not grant relief when the omission was wilful and wanton, or attended with suffering or serious inconvenience to the grantee, or there was any good ground to apprehend a recurrence of the failure to perform, as was held in *Dunklee v. Adams*, 20 Vt. 421.

"The court very readily perceive that the subject under consideration may admit of many cases where no relief should be granted in equity. This very class of cases will afford abundant illustrations of the essential necessity and manifest propriety of holding the subject under the control of the courts of chancery, and making the relief dependent, to some extent, upon circumstances. The case might occur where the refusal to afford daily support would be wanton and wicked: indeed where it might proceed from murderous intentions even; and it is even supposable that the treatment of those who were the objects of the services should be such as to subject the grantor to indictment for manslaughter, or murder even, and possibly to ignominious punishment, and to death. To afford

relief in such a case, for the benefit of the heirs, would be to make the court almost partakers in the offence.

“And the case upon the other hand is entirely supposable and of not infrequent occurrence, when, through mere inadvertence, a technical breach may have occurred in the non-performance of some unimportant particular, in kind or degree, where, through perhaps mere difference in construction, or error in judgment, one may have suffered a forfeiture of an estate, at law, of thousands of dollars in value, where the collateral service was not of one dollar's value, and attended with no serious inconvenience to the grantee. Not to afford relief in such a case would be a discredit to the enlightened jurisprudence of the English nation and of those American States that have attempted to follow the same model.”

We have ventured to insert the argument, by which the propositions in the text are maintained, in the case referred to, because it covers the main ground of the question of forfeitures, in courts of equity, which is one of great practical importance to the profession, and attended with considerable uncertainty; and it contains all which we should now feel justified in saying, in regard to the present state of the authorities, and their possible conflict, and acknowledged indefiniteness and unsatisfactory character.

CHAPTER XXXV.

INFANTS.

[* § 1327. Jurisdiction in equity over infants, idiots, lunatics, and married women.

§ 1328. Origin of the jurisdiction obscure.

§ 1329. Jurisdiction over infants in court of chancery; over idiots and lunatics, by special commission.

§ 1330. Guardianship not an equitable trust.

§ 1331. Guardianship not traceable to writ of ravishment of ward.

§ 1332. Some have called it a usurpation.

§ 1333. Referable to the crown as *parens patriæ*.

§ 1334. It naturally devolved upon the Court of Chancery.

§ 1335. Appeal lies to House of Lords from order of chancellor in case of infants, but to Privy Council in case of idiots and lunatics.

§ 1336. Ground of special commission for lunatics and idiots.

§ 1337. The jurisdiction over infants is now firmly established.

§ 1338. Will appoint guardians over infant's property.

§ 1338 a. Will not interfere with testamentary guardians, except for good cause.

§ 1339. Will, for cause, remove, or control, guardians.

§ 1340. Will aid guardians in control of wards.

§ 1341. Will even remove infants from the control of parents.

§ 1341 u. Will determine which parent shall educate child.

§ 1342. This portion of the jurisdiction firmly established.

§ 1343. The father, *primâ facie*, may control his child.

§ 1344. But in case of abuse, court may clearly interfere.

§ 1345. Father may be controlled same as other guardian.

- § 1346. May apply infants' property for their education.
- § 1347. The right to interfere with father not unquestionable.
- § 1347 *a*, 1347 *b*. But it must be upon very good grounds. The interference of the court more tolerable than that of strangers.
- § 1347 *c*. The court will not enforce contracts affecting guardianship.
- § 1347 *d*. The court of appeal will not ordinarily control appointments of guardians by inferior courts.
- § 1348. Origin of jurisdiction not more difficult than many others.
- § 1349. It is an incident of its jurisdiction of the property.
- § 1350. Rules of the civil law on the subject.
- § 1351. This jurisdiction is limited to cases brought by bill.
- § 1352. Any infant whose property is in litigation in equity is regarded as a ward of the court.
- § 1352 *a*. But an infant may be put under guardianship, in equity, whose property and guardian are in a foreign country.
- § 1353. Equity exercises special vigilance in regard to its wards.
- § 1354. Will direct the mode of maintenance.
- § 1354 *a*. The infant's property can only be used when father not of ability.
- § 1354 *b*. Will sometimes make such orders as to infants resident abroad.
- § 1355. Will not ordinarily expend more than income.
- § 1355 *a*. Court cannot exercise discretion reposed in trustees.
- § 1356. Will exercise vigilance over infant's property.
- § 1357. Will not commonly sanction the conversion of estate.
- § 1358. Contempt to marry its ward without sanction of court.
- § 1359. Recognizance that ward shall not marry in contempt of court.
- § 1360. Will interdict marriage by injunction.
- § 1361. Will fix settlement, and require husband to make it.]

§ 1327. WE shall next consider the jurisdiction of courts of equity over the persons and property of infants, idiots, lunatics, and married women.

§ 1328. And, in the first place, as to the jurisdiction over the persons and property of INFANTS. The origin of this jurisdiction in chancery, (for to that court it is practically confined, as the Court of Exchequer, as a court of equity does not seem entitled to exercise it,)¹ is very obscure, and has been a matter of much juridical discussion.² The common manner of accounting for it

¹ 3 Black. Comm. 427; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a). Mr. Justice Blackstone (3 Black. Comm. 427) has said: "The Court of Exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant, if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice. But, when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal, indiscriminately, will take care of the property of the infants." See also 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); Wellesley v. Wellesley, 2 Bligh (N. S.), 136, 137.

² See Williamson v. Berry, 8 Howard (U. S.) R. 495; McCord v. O'Chiltree, 8 Blackford, 15; Maguire v. Maguire, 7 Dana, 181.

has been thought by a learned writer to be quite unsatisfactory.¹ It is, that the king is bound by the law of common right, to defend his subjects, their goods, chattels, lands, and tenements; and therefore, in the law, every royal subject is taken into the king's protection. For which reason an idiot or lunatic, who cannot defend or govern himself, or order his lands, tenements, goods, or chattels, the king, of right, as *parens patriæ*, ought to have in his custody, and rule him and them.² And for the same reason, the king, as *parens patriæ*, ought to have the care of the persons and property of infants, where they have no other guardian of either.³

§ 1329. The objection urged against this reasoning is, that it does not sufficiently account for the existing state of the jurisdiction; for there is a marked distinction between the jurisdiction in cases of infancy, and that in cases of lunacy and idiocy. The former is exercised by the chancellor, in the Court of Chancery, as a part of the general delegation of the authority of the crown, *virtute officii*, without any special warrant; whereas the latter is exercised by him by a separate commission under the sign-manual of the king, and not otherwise.⁴ It is not safe or correct, therefore, to reason from one to the other, either as to the nature of the jurisdiction, or as to the practice under it.⁵

§ 1330. An attempt has also been made to assign a different origin to the jurisdiction, and to sustain it, by considering guardianship, as in the nature of a trust; and that, therefore, the jurisdiction has a broad and general foundation, since trusts are the peculiar objects of equity jurisdiction.⁶ But this has been thought to be an overstrained refinement; for, although guardianship may properly be denominated a trust, in the common acceptation of the term, yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery. In the latter, trusts are invariably applied to property (and especially to

¹ Hargrave's note (70) to Co. Litt. 89 a, § 16.

² Fitz. N. B. 232; Eyre v. Countess of Shaftesbury, 2 P. Will. 118; Beverly's case, 4 Co. R. 123, 124.

³ Eyre v. Countess of Shaftesbury, 2 P. Will. 118, 119; 3 Black. Comm. 427; Cary v. Bertie, 2 Vern. 333, 342.

⁴ Co. Litt. 89 a, Hargrave's note (70), § 15; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); Sheldon v. Fortescue, Aland, 3 P. Will. 104, 107, and Mr. Cox's note A; Sherwood v. Sanderson, 19 Ves. 285.

⁵ *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Phillips, 19 Ves. 122.

⁶ See Duke of Beaufort v. Bertie, 1 P. Will. 705; *Post*, § 1343 to 1345.

real property) and not to persons.¹ It may be added, that guardianship, considered as a trust, would equally be within the jurisdiction of all the courts of equity; whereas in England it is limited to the chancellor, sitting in chancery.²

§ 1331. An attempt has also been made to derive the jurisdiction from the writ of *Ravishment of Ward*, and the writ *De Recto de Custodia* at the common law, but with as little success. For, independently of the consideration, that these writs were returnable into a court of common law, it is not easy to see how a jurisdiction, to decide between contending competitors for the right of guardianship, can establish a general authority, in the Court of Chancery, to appoint a guardian in all cases where one happens to be wanting.³

§ 1332. It has been further suggested, that the appointment of guardians in cases where the infants had none, belonged to the chancellor, in the Court of Chancery, before the erection of the Court of Wards; and that, upon the abolition of that court, it reverted to the king, in his court of chancery, as the general protector of all the infants in the kingdom.⁴ But this (it has

¹ Co. Litt. 89 *a*, Hargrave's note (70), § 17.

² *Ante*, § 1328; *Post*, § 1343, 1349, 1351; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a).

³ Co. Litt. 89 *a*, Hargrave's note (70), § 16; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a).

⁴ *Ibid.*; 3 Black. Comm. 426, 427; *Morgan v. Dillon*, 9 Mod. R. 139, 140; 1 Wooddes. Lect. 17, p. 463; *Hughes v. Science*, Macpherson on Infants, ch. 6, p. 74, and Appendix. In this case, Lord Hardwicke said: "The court has originally exercised a superintendent jurisdiction over guardians, in behalf of infants, to prevent abuses either in their persons or estates, as well as in behalf of the crown and inferior lords who had formerly a great interest in the wardship of infants. Afterwards, the Court of Wards being created, took the jurisdiction out of the chancery for the time. But as soon as that court came to be dissolved, the jurisdiction devolved again upon this court; and infants have ever since been considered as under the immediate care of chancery." *Post*, § 1333, note; S. C. Ambler, R. 302, note (2). Mr. Fonblanque has upon this subject remarked: "From this it might be inferred, that the jurisdiction of the Court of Wards and Liveries was protective of infants in general; whereas the statute of Henry VIII. by which the Court of Wards was erected, expressly confines the jurisdiction of that court to wards of the crown. And it is scarcely necessary to remark, that when a new court is erected, it can have no other jurisdiction than that which is expressly conferred; for a new court cannot prescribe. 2 Inst. 200. But if the statute 32 Hen. VIII. does not confer a general jurisdiction in the case of infants, but merely a particular jurisdiction as to wards of the court, it should seem to follow, that the general superintendence of the crown over infants, as *pater pa-*

been objected) is rather an assertion, than a proof, of the jurisdiction; for it is difficult to trace it back to any such ancient period. The earliest instance which has been found, of the actual exercise of the jurisdiction by the chancellor, to appoint a guardian, upon petition without bill, is said to be that of Hampden, in the year 1696. Since that period, indeed, it has been constantly exercised without its once being called in question. Mr. Hargrave has not hesitated to say, that, although the jurisdiction is now unquestionable, yet it seems to have been a usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for.¹ He has added, that, although the care of infants, as well as of idiots and lunatics, should be admitted to belong to the crown; yet, that something further is necessary to prove that the chancellor is the person constitutionally delegated to act for the king.²

§ 1333. Notwithstanding the objections thus urged against the legitimacy of the origin of the jurisdiction, it is highly probable that it has a just and rightful foundation in the prerogative of the crown, flowing from its general power and duty as *parens patriæ*, to protect those who have no other lawful protector.³ It has *trix*, if it existed at common law, was not affected by the statute, except in those cases to which it expressly refers. What those cases were, are particularly enumerated by the statute, and also in the instructions to the Court of Wards and Liveries, prefixed to Ley's Reports. See also Reeve's Hist. Eng. Law, v. 4, p. 259." 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a).

¹ Hargrave's note (70), § 16, Co. Litt. 89 a; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a). There is very great reason to question this conclusion of the learned author; nor is it very likely, that, at so late a period as 1696, a clear usurpation of an authority of this nature should have been either claimed by the chancellor, or tolerated by parliament. In Fitzherbert's *Natura Brevium* (p. 27, L.), a very ancient work of great authority, it is said, that "the king, by his letters-patent, may make a general guardian for an infant, to answer for him in all actions or suits brought, or to be brought, in all manner of courts." It is added, "And the infant shall have a writ in the chancery for to remove his guardian, directed unto the justices, and for to receive another, &c.; and the court, at their discretion, may remove the guardian, and appoint another guardian."

² Ibid.

³ The learned reader is referred to the elaborate note of Mr. Hargrave to Co. Litt. 89 a, note (70), § 16, for the objections to the jurisdiction, which are there fully considered; and also to the equally elaborate note of Mr. Fonblanque (2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note a), for the answers to those objections. The view of the matter taken in the text is almost exclusively derived from the note of Mr. Fonblanque. Lord Eldon, in *De Manneville v. De Manneville* (10 Ves. 63, 64), after referring to the notes of Mr. Hargrave and Mr. Fonblanque, stated, that "the latter had stated the principle very correctly." See also *Morgan v. Dillon*, 9 Mod. 139, 140.

been well said, that it will scarcely be controverted, that, in every civilized state, such a superintendence and protective power does somewhere exist. If it is not found to exist elsewhere, it seems to be a just inference from the known prerogatives of the crown, as *parens patriæ*, in analogous cases, to presume, that it vests in the crown.¹ It is no slight confirmation of this inference, that it has been constantly referred to such an origin in all the judicial investigations of the matter,² as well as in the discussions of very learned elementary writers.³

§ 1334. Assuming, then, that the general care and superintend-

¹ See *Beverley's case*, 4 Co. R. 123, 124; *Bract. Lib.* 3, cap. 9; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118, 123. See, also, 1 Madd. Ch. Pr. 262, 263.

² *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118, 123; *Butler v. Freeman*, Ambler, R. 302; *Hughes v. Science*, 2 Eq. Abridg. 756; *De Manneville v. De Manneville*, 10 Ves. 63, 64; *Morgan v. Dillon*, 9 Mod. 139, 140; 1 Madd. Ch. Pr. 262.

³ 3 Black. Comm. 427; *Fitz. Nat. Brev.* 27; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); 1 Madd. Ch. Pr. 262, 263. In *Butler v. Freeman* (Ambler, R. 302), Lord Hardwicke is reported to have said, with reference to this subject: "This court does not act on the footing of guardianship or wardship. The latter is totally taken away by the statute of Car. II. And without claiming the former, and disclaiming the latter, it has a general right delegated by the crown as *pater patriæ*, to interfere in particular cases for the benefit of such who are incapable to protect themselves. In the case of *Hughes v. Science* (cited in Ambler, R. 302, Mr. Blunt's note 2) the same learned judge said: "The law of the country has taken great care of infants, both their persons and estates, and particularly to prevent marriages to their disparagement. For that purpose it had assigned them guardians; and if a stranger married without the guardian's consent, it was considered a ravishment of ward, and the party was deemed punishable by fine and imprisonment; and so it was, if the guardian himself married the infant to another to its disparagement. And the court has originally exercised a superintendent jurisdiction over guardians in behalf of infants, to prevent abuses, either in their persons or estates, as well as in behalf of the crown; and inferior lords, who had formerly a great interest in the wardship of infants. Afterwards, indeed, the Court of Wards being created, took the jurisdiction out of chancery for a time. But, as soon as that court came to be dissolved, the jurisdiction devolved again upon the court, and infants have ever since been considered as under the immediate care of chancery. Whenever a suit is commenced here on their behalf, and even without suit, the court every day appoints guardians on petition; and the marriage of an infant to his guardian or any other without the consent of the court, where a suit is depending here in behalf of their infant, has been always treated and punished as a contempt. See Serj. Hill's MSS. vol. 6, p. 8." S. C. cited at large in Macpherson on Infants, Appendix I. See, also, Lord Eldon's remarks in *De Manneville v. De Manneville*, 10 Ves. 63, 64.

ence of infants did originally vest in the crown, when they had no other guardian, the question, by whom, and in what manner, the prerogative should be exercised, would not seem open to much controversy. Partaking, as it does, more of the nature of a judicial administration of rights and duties in *foro conscientiæ*, than of a strict executive authority, it would naturally follow *ed ratione*, that it should be exercised in the Court of Chancery, as a branch of the general jurisdiction originally confided to it. Accordingly, the doctrine now commonly maintained is, that the general superintendence and protective jurisdiction of the Court of Chancery over the persons and property of infants is a delegation of the rights and duty of the crown; that it belonged to that court, and was exercised by it from its first establishment; and that this general jurisdiction was not even suspended by the statute of Henry VIII., erecting the Court of Wards and Liveries.¹

¹ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); *Morgan v. Dillon*, 9 Mod. 139, 140; *De Manneville v. De Manneville*, 10 Ves. 63, 64; *Ex parte Philips*, 19 Ves. 122; *Cary v. Bertie*, 2 Vern. R. 342; *Wellesley v. Duke of Beaufort*, 2 Russ. R. 20, 21; *Wellesley v. Wellesley*, 2 Bligh, R. (N. S.) 129, 136; *Id.* 142. Lord Eldon, in the celebrated case of *Wellesley v. Duke of Beaufort* (2 Russ. 20), speaking on the subject of the jurisdiction of the Court of Chancery over infants, and especially of its interfering between parent and child, said: "I do apprehend that, notwithstanding all the doubts that may exist as to the origin of this jurisdiction, it will be found to be absolutely necessary that such a jurisdiction should exist, subject to correction by appeal, and subject to the most scrupulous and conscientious conviction of the judge; that he is to look most strictly into the merits of every case of this kind, and with the utmost anxiety to be right. It has been questioned, whether this jurisdiction was given to this court upon the destruction of the Court of Wards (which, however, it is impossible to say could have been the case, when we recollect the nature of the jurisdiction), or whether it is to be referred to circumstances and principles of a different nature; more especially, whether it belongs to the king, as *parens patriæ*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them. With respect to the doctrine, that this authority belongs to the king, as *parens patriæ*, exercising a jurisdiction by this court, it has been observed at the bar, that the court had not exercised that jurisdiction, unless where there was property belonging to the infant, to be taken care of in this court. Now, whether that be an accurate view of the law or not; whether it is founded on what Lord Hardwicke says in the case of *Butler v. Freeman*, 'that there must be a suit depending relative to the infant or his estate' (applying, however, the latter words rather to what the court is to do with respect to the maintenance of infants); or whether it arises out of a necessity of another kind, namely, that the

§ 1335. The jurisdiction over idiots and lunatics is distinguishable from that over infants, in several respects. The former is a

court must have property in order to exercise this jurisdiction, — that is a question to which, perhaps, sufficient consideration has not been given. If any one will turn his mind attentively to the subject, he must see that this court has not the means of acting, except where it has property to act upon.” The same case was afterwards carried to the House of Lords upon appeal; and Lord Redesdale, in delivering his opinion in the House of Lords on that occasion, in affirmation of the decree below, said: “ We find, that now, for a hundred and fifty years, the Court of Chancery has assumed an authority with respect to the care of infants; and it has assumed that authority to the extent in which it was assumed, for this reason. As long as the feudal tenures remained, generally speaking, infants who had lost their parents were under the protection of the law, which then existed, with respect to the treatment and the care of the children. When that was at an end, it was thought fit, by a particular statute, to enable the father to make an appointment of a guardian for his children, giving to him the power which that statute gave, to select proper persons for that purpose. As I observed before, if he makes an improper selection, if the person whom he has so selected misconduct himself, it is perfectly clear that a power has been assumed to control that conduct. Now, upon what does Lord Somers, upon what does Lord Nottingham, upon what does Lord Hardwicke, upon what ground does every chancellor, who has been sitting on the bench in the Court of Chancery, since that time, place the jurisdiction? They all say, that it is a right which devolves to the crown, as *parens patriæ*, and that it is the duty of the crown to see that the child is properly taken care of. We all know, that many jurisdictions are given to the crown, many powers are given to the crown; but those powers are all to be exercised by responsible ministers. It is not the king, who takes on himself to determine who is to be a proper guardian of the children; but he is to delegate to different ministers the different kind of powers which belong to him, that there may be, according to the language of our law, persons responsible to the king and the people for their good conduct, in the administration of their trust. I, therefore, have no doubt in the world, that it must be taken to be a jurisdiction rightly assumed, for a hundred and fifty years past unquestionably assumed, by the chancellors sitting in the Court of Chancery. Lord Somers resembled the jurisdiction over infants to the care which the court takes with respect to lunatics, and supposed that the jurisdiction devolved on the crown in the same way. There is no particular law upon the subject. The law merely declares, that the king has the care of the persons who are of insane mind, and that he is to take care of their property. If they are absolute idiots, the property devolves to him during their lives, and he is to provide only for their maintenance. If they are not idiots, but persons who have lucid intervals, then the king is to take care of their property, to take care of their persons, to take care of their maintenance. And whatever property may be accumulated in the mean time, he is a trustee of it for the benefit of those who may be entitled at their death, or to them, if they should ever recover. With respect to the case of infants, can there be a stronger proof, that it was conceived to be reserved to the crown than this: — that the city of London claim, as an immemorial right, and a right which must have been derived to them from the crown, the care of orphans,

personal trust in the Lord Chancellor, and especially delegated to him under the sign-manual of the king; and from his decree no appeal lies, except to the king in council.¹ On the other hand, the latter belongs to the Court of Chancery, and it may be exercised, as well by the Master of the Rolls, as by the Lord Chancellor, and therefore, an appeal does lie from the decision of the Court of Chancery in cases of infants to the House of Lords.²

§ 1336. It may be asked, why, if no particular warrant be necessary to enable the Court of Chancery to exercise its protective power and care over infants, a separate commission under the sign-manual should be necessary to confer on the chancellor the jurisdiction over idiots and lunatics, since that also has been referred to the protecting prerogative of the crown as *parens patriæ*. The answer which has been given (and perhaps it is a true one) is, that in point of fact, the custody of the persons and property of idiots and lunatics, or at least, of those who held lands, was not anciently in the crown, but in the lord of the fee. The statute (*De Prerogativâ Regis*) of the 7th of Edward II. ch. 9, (or, as Lord Coke and others suppose, some earlier statute,³) gave to the king the custody of idiots, and also vested in him the profits of the idiot's lands during his life.⁴ By this means the crown acquired

and that they have most extraordinary powers for that purpose, extending to enable the Court of Orphans to commit to Newgate a person who disobeys their order? That has been allowed in a court of common law; and it is founded upon usage, which must have been founded originally upon a grant from the crown of such powers to the corporation of London. I think there can be no doubt, therefore, that the law of this country has reserved to the king the prerogative for the protection of infants, to be executed in such a manner as the constitution requires him to execute all his prerogatives. *Wellesley v. Wellesley*, 2 Bligh, R. (N. S.) 129 to 135. In pages 134 to 136, the subject is further examined and illustrated by his lordship. See, also, *Id.* p. 141, 142, Lord Mannors's opinion.

¹ *Sheldon v. Fortesque*, Aland, 3 P. Will. 104, 107, Mr. Cox's note (A); *Rochfort v. Earl of Ely*, 6 Bro. Parl. Cas. 329; *Sherwood v. Sanderson*, 19 Ves. 285; *Ex parte Phillips*, 19 Ves. 122, 123.

² 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); *Oxenden v. Compton*, 2 Ves. Jr. 71, 72.

³ *Ibid.* See 2 Co. Inst. 14; 2 Reeve's Hist. ch. 12, p. 307, 308; 1 Black. Comm. 302, 303; Fitz. N. Brev. 232.

⁴ Lord Coke, in 2 Inst. 14, speaking of the provision in Magna Charta, ch. 4, says: "At the making of this statute the king had not any prerogative in the custody of the lands of idiots during the life of the idiots; for if he had, this act would have provided against waste, &c., committed by the committee or assignee of the king, to be done in his possessions, as well as in the possessions of wards. But at this

a beneficial interest in the lands ; and, as a special warrant from the crown is, in all cases, necessary to any grant of its interest, the separate commission, which gives the Lord Chancellor jurisdiction over the persons and property of idiots, may be referred to this consideration.¹ With respect to lunatics, the statute of 17 Edward II. ch. 10, enacted, that the king should provide that their lands and tenements should be kept without waste. It conferred merely a power which could not be considered as included within the general jurisdiction, antecedently conferred on the Court of Chancery ; and therefore, a separate and special commission became necessary for the delegation of this new power.² There is,

time the guardianship of idiots, &c., was to the lords and others, according to the course of the common law." In *Beverley's case* (4 Co. Rep. 126), it is expressly declared, that the statute of 17 Edward II. ch. 9, is but an affirmance or declaration of the common law. So Mr. Justice Blackstone, in his *Commentaries* (1 Black. Comm. 303), treats it. Lord Coke thinks that this prerogative was given to the crown by some statute not now extant, in the reign of Edward I., after Bracton wrote his work, and before that on Britton. 2 Inst. 14. See also Lord Northington's opinion in *Ex parte Grimstone*, Ambler, R. 707.

¹ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a) ; *De Manneville v. De Manneville*, 10 Ves. 63, 64 ; 1 Black. Comm. 303, 304.

² Ibid. Lord Loughborough, in *Oxenden v. Lord Compton* (2 Ves. Jr. 71, 72, S. C. 4 Bro. Ch. R. 231), considered the statute of 17 Edw. II. ch. 10, as merely in affirmance of the antecedent rights of the crown. His language on that occasion was: "That leads to the principle, upon which the administration of the estates of lunatics stands; and how it is committed, not to the Court of Chancery, but to a certain great officer of the crown. The statute (17 Edward II. ch. 10), is not introductive of any new right of the crown. The better opinion inclines that way; and the words of the statute put it past all doubt. The object was, to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of idiots." Again: "The course upon the statute has been, that the crown has committed, to a certain great officer of the crown, not of necessity the person who has the custody of the great seal (namely, the Lord Chancellor or Lord Keeper), though it usually attends him by a warrant from the crown, which confers no jurisdiction, but only a power of administration. If that power is abused, if anything wrong is done, or error committed, the appeal is immediately to the king, and not in the ordinary course, attending the established jurisdiction of the kingdom. The orders, that are made by persons charged with the custody of lunatics, are appealable to the king in council." Lord Apsley, in *Ex parte Grimstone* (Ambler, R. 707 ; S. C. 4 Bro. Ch. R. 235, note), said: "It (the right of the crown over idiots and lunatics) certainly existed before the statute *De Prerogativa Regis*. (17 Edw. II. ch. 9, 10.) The writ does not go, of course; but must be sued for. After the return to the commission, the great seal, by virtue of the king's sign-manual, grants the custody, merely to save the application to the king in person. After the custody is granted, the great seal acts in

under the statute, a difference between the case of an idiot, and that of a lunatic, in this respect. In the case of a lunatic, the king is a mere trustee; in the case of an idiot, he has a beneficial interest.¹

matters relative to the lunatic, not under the sign-manual, but by virtue of its general power, as keeper of the king's conscience. It is usual to take bonds from the committees to account and submit to orders; but I do not apprehend it is absolutely necessary. The court makes many orders, and enforces them by attachments, which orders, and the manner of enforcing them, are not warranted by the sign-manual, but by the general powers of the court." In the *Corporation of Burford v. Lenthall* (2 Atk. 553), Lord Hardwicke said: "Before the courts of wardship were erected, the jurisdiction was in this court, both as to lunatics and idiots; therefore all these commissions were taken out in this court, and returned here; and after the Court of Wards was taken away by act of parliament, it reverted back to the Court of Chancery; and the sign-manual of the king is a standing warrant to the Lord Chancellor, to grant the custody of the lunatics, and is a beneficial thing in case of idiocy; because the king could not only give the custody of idiots, but the rents and profits of idiots' lands to persons." Again: *In re Heli* (3 Atk. 635), he said: "One part of the Chancellor's power, in relation to idiots and lunatics, is by virtue of a sign-manual of the king, upon his coming to the great seal, and countersigned by the two secretaries of state, empowering him to take care of such persons in the right of the crown, and to make grants from time to time of the idiots' or lunatics' estates." If one might venture to make a suggestion in a case, where there seems no small diversity of opinion, it would be, that, upon general principles, the king, as *parens patriæ*, has an original prerogative to take care of persons and property of infants, of idiots, and of lunatics, in all cases, where no other guardianship exists. So long as any special guardianship exists by law or custom in other persons, the prerogative of the crown is inactive, but not suspended. The jurisdiction generally belongs to the Court of Chancery, as delegate of the crown, except where it is specially or personally delegated, or restricted by statute. The statute *De Prerog. Regis*, ch. 9, 10, has rendered special commissions for certain purposes necessary to be granted under the sign-manual; and the jurisdiction being in fact committed to the same person, has, in practice, become mixed. If this view of the subject be admitted to be correct, it will clear away some of the difficulties now incumbering the subject.

¹ *In re Fitzgerald*, 2 Sch. & Lefr. 436. The difference is fully expounded by Lord Redesdale, *In re Fitzgerald* (2 Sch. & Lefr. 436). "There is a difference," said he, "in the case of an idiot and a lunatic in this respect. In the case of a lunatic the king is a mere trustee; in the case of an idiot he has a beneficial interest. In point of form, in the terms of the grant to the committee, the grant of a lunatic's estate is a grant liable to account; and the other is a grant to a certain degree without account; that is, the king is not bound to do more than provide for the maintenance of the idiot; and is entitled by his prerogative, to the surplus of his estate. The words of the statutes (which are said in *Beverley's case*, 4 Co. 126, 127, to be only declaratory of the common law) differ as to the provisions

[* § 1337. This jurisdiction is now firmly established in the Court of Chancery,¹ and we shall consider it in detail, in the appointment and removal of guardians; in the maintenance of infants; in the management and disposition of the property of infants; and lastly, in the marriage of infants.]

§ 1338. The Court of Chancery will appoint a suitable guardian to an infant, where there is none other, or none other who will, or can act, at least, where the infant has property; for if the infant has no property, the court will perhaps not interfere. It is not however, from any want of jurisdiction² that it will not interfere

for the care of the property of an idiot and a lunatic. In the one case, the king having an interest, is said 'to have the custody of an idiot, his lands,' &c., &c. But with respect to the other, the words of the statute, and the language of those who have written on the subject, are, that 'the king shall provide, when any happen to fail of his wit, that their lands and tenements shall be safely kept without waste, and that they and their household shall be maintained with the profit, and that the residue shall be kept to their use, to be delivered to them when they come to right mind.' So that the meaning simply is, that, in the one case, the king shall have a personal benefit; but that, in the other, he is only to act as *paterfamilias*, as the person to take care of those who are incompetent to take care of themselves. And the statute, with respect to lunatics, expressly provides, 'nec rex aliquid de exitibus recipiat ad opus suum.' These are direct negative words, that the king cannot take the profits for his own use; but, as to what is not in itself profitable, as the presentation to a church, the king takes. Then the statute proceeds to direct, that, if the party shall die in this condition, the residue shall be distributed for the benefit of his soul, according to the superstition of the times in which the statute was made; which is certainly now to be taken as a direction to preserve the residue for those entitled to the personal estate of the lunatic on his death, independent of that statute." Again, in *Lysaght v. Royse* (2 Sch. & Lefr. 153), the same learned chancellor said: "Some doubt occurs to me, as to the validity of the grant of the estate of the idiot. Under warrant of the king's sign-manual, countersigned by the lords of the treasury, the chancellor has the ordering and disposition of the persons and estates of idiots and lunatics. This authority is given to him (as stated in the warrant) in consideration of its being his duty, as chancellor, to issue the commissions, on which the inquiry, as to the fact of idiocy or lunacy, is to be made. The warrant certainly gives to the chancellor the right of providing for the maintenance of idiots and lunatics, and for the care of their persons and estates. For lunatics the crown is merely a trustee. But in the case of an idiot, the crown is absolutely entitled to the profits, subject to the maintenance of the idiot. And I doubt whether the warrant thus given to the chancellor is a warrant for passing letters-patent, granting to any person, for his own benefit, the surplus profits of the estate of the idiot."

¹ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1; *Wellesley v. Duke of Beaufort*, 2 Russ. R. 19; *Duke of Beaufort v. Berty*, 1 P. Will. 702, 796.

² See *Spence, in re*, 2 Phillips, 247, 11 Jur. 399.

in such a case, but from the want of means to exercise its jurisdiction with effect; because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this part of its jurisdiction usefully and practically only where it has the means of doing so; that is to say by its having the means of applying property for the use and maintenance of the infant.¹ Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it.²

§ 1338 a. The question of who are to be appointed guardians, is generally one of discretion, merely; and the court ordinarily³ refers it to a master, especially if the guardianship be contested between two or more parties,⁴ to appoint guardians, leaving the person in whose custody the infant actually is, to retain that custody until the coming in of the master's report.⁵ But if there are testamentary guardians, the court has no jurisdiction to interfere. If the testamentary appointment, however, be one that contemplates the residence of the child in the country of its birth, as in Scotland, for example, and the child be removed to a residence in England, it seems that the Court of Chancery in England will appoint guardians there; and the testamentary appointment will be looked at only as an expression of the parent's preferences, to which the court will give great influence.⁶ But at the same time, the court will look at all the circumstances, and not appoint the persons for whom the parent has expressed a preference, if they are resident in Scotland, unless the court is satisfied that it was

¹ Lord Eldon, in *Wellesley v. Duke of Beaufort*, 2 Russ. R. 21. — The court will appoint a guardian upon petition, without a bill being filed; and it is done upon the petition of the infant himself or of some person in his behalf. See *Da Costa v. Mellish*, 2 Atk. 14; S. C. 2 Swanst. R. 533, where it is better reported; and in *West's Rep.* 299; *Ex parte Mountfort*, 15 Ves. 445; *Ex parte Salter*, 2 Dick. R. 769; *Wilcox v. Drake*, 2 Dick. R. 631; S. C. cited *Jacob's R.* 251, note (c); *Curtis v. Rippon*, 4 Madd. R. 462; *Ex parte Myerscough*, 1 Jack. & Walk. 151; *Ex parte Richards*, 3 Atk. 518; *Ex parte Birchell*, 3 Atk. 813; *Ex parte Woolscombe*, 1 Madd. R. 213; *Ex parte Wheeler*, 16 Ves. 256; *In re Jones*, 1 Russ. R. 478; *Bradshaw v. Bradshaw*, 1 Russ. R. 528; 1 Madd. Ch. Pr. 167, 268.

² *Wellesley v. Duke of Beaufort*, 2 Russ. R. 1, 20, 21; *Post*, § 1351.

³ But a reference to the master is sometimes not practised. See *Bond, in re*, 11 Jurist, 114.

⁴ See *Knott v. Cotte*, 2 Phillips, 192.

⁵ *Coham v. Coham*, 13 Simons, 639.

⁶ See *Miller v. Harris*, 14 Sim. 540; *Johnstone, in re*, 2 Jones & Latouche, 222.

his intention to appoint them guardians generally, and not guardians for Scotland merely.¹

§ 1339. In the next place, as to the removal of guardians. The Court of Chancery will not only remove guardians appointed by its own authority, but it will also remove guardians at the common law, and even testamentary or statute guardians, whenever sufficient cause can be shown for such a purpose.² In all such cases, the guardianship is treated as a delegated trust, for the benefit of the infant, and, if it is abused, or in danger of abuse, the Court of Chancery will interpose, not only by way of remedial justice, but of preventive justice.³ Where the conduct of the guardian is less reprehensible, and does not require so strong a measure as a removal, the court will, upon special application, in-

¹ *Beattie v. Johnson*, 1 Phillips, Ch. R. 17; S. C. in House of Lords, 10 Clarke & Fin. 42. [* See also *Albert v. Perry*, 1 McCarter, 540.]

² In *Foster v. Denny*, 2 Ch. Cas. 238, the Lord Chancellor said: "Where there is a guardianship by the common law, this court will intermeddle and order; but being here a guardian by act of parliament, I cannot remove him or her." But this doctrine seems to have been denied by Lord Macclesfield, in *The Duke of Beaufort v. Berty* (1 P. Will. 703), who asserted the jurisdiction of the court to be the same over statute guardians as over common-law guardians. Lord Hardwicke held the same opinion, in *Butler v. Freeman*, Ambler, R. 302, and *Roach v. Garvan*, 1 Ves. 160. Lord Eldon, in *Wellesley v. Duke of Beaufort* (2 Russ. R. 1, 21, 22), fully recognized the same doctrine, as did also Lord Redesdale and Lord Manners, in their opinions in *Wellesley v. Wellesley*, 2 Bligh, R. (N. S.) 128 to 130, 145, 146. In the *Duke of Beaufort v. Berty* (1 P. Will. 705), Lord Macclesfield said: "If the guardian chose to make use of methods that might turn to the prejudice of the infant, the court will interfere, and order the contrary; and, that this was granted upon the general power and jurisdiction which it had over all trusts; and a guardianship was most plainly a trust." Mr. Fonblanque (2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a), and § 2, note (h)) seems to have thought, that a testamentary guardian cannot be removed; although his conduct may be regulated by the court, and he may be restricted from doing any acts to the prejudice of the infant. But it appears to me that he is not warranted in this opinion by the authorities. See *Eyre v. Countess of Shaftesbury*, 2 P. Will. 107; 1 Wooddes. Lect. 17, p. 461; *Morgan v. Dillon*, 9 Mod. 139 to 141; Com. Dig. *Chancery*, 3 O. 4, 5; *Spencer v. Earl of Chesterfield*, Ambler, R. 146; *Okeefe v. Casey*, 1 Sch. & Lefr. 106; *Tombes v. Elers*, 1 Dick. 88; *Smith v. Bate*, 2 Dick. 631; *Ex parte Crumb*, 2 Johns. Ch. R. 439. But in *Ingham v. Bickerdile* (6 Madd. 276), the Vice-Chancellor seems to have thought that the court cannot remove a testamentary guardian, though it might appoint some other person to superintend the maintenance and education of the infant.

³ *Wellesley v. Duke of Beaufort*, 2 Russell, R. 1, 20, 21; *Wellesley v. Wellesley*, 2 Bligh, R. (N. S.) 128 to 130; *Id.* 141, 142, 145, 146; *Duke of Beaufort v. Berty*, 1 P. Will. 704, 705; Com. Dig. *Chancery*, 3 O. 4, 5.

terfere, and regulate, and direct the conduct of the guardian in regard to the custody, and education, and maintenance of the infant;¹ and, if necessary, it will inhibit him from carrying the infant out of the country, and it will even appoint the school where he shall be educated.² In like manner, it will, in proper cases, require security to be given by the guardian, if there is any danger of abuse or injury to his person or to his property.³

§ 1340. The Court of Chancery will not only interfere to remove guardians for improper conduct, but it will also assist guardians in compelling their wards to go to the schools selected by the guardian, as well as in obtaining the custody of the persons of their wards, when they are detained from them. This may not only be done by the chancellor, acting as any other judge, by a writ of *habeas corpus*, but it may also be done on a petition, without any bill being filed in the court.⁴

§ 1341. The jurisdiction of the Court of Chancery extends to the care of the person of the infant, so far as necessary for his protection and education; and as to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance.⁵ It is upon the former ground, principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children.⁶ For although, in general, parents

¹ See McCulloch, *in re*, 1 Drury, 276.

² Duke of Beaufort *v.* Berty, 1 P. Will. 703, 704; De Manneville *v.* De Manneville, 10 Ves. 65; Lyons *v.* Blenkin, Jacob's R. 245; Skinner *v.* Warner, 2 Dick. R. 779; Tombes *v.* Elers, 1 Dick. 88; Talbot *v.* Earl of Shrewsbury, 4 Mylne & Craig, R. 672.

³ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); Foster *v.* Denny, 2 Ch. Cas. 237; Hanbury *v.* Walker, 3 Ch. R. 58; 1 Madd. Ch. Pr. 263, 264, 268, 269.

⁴ Eyre *v.* Countess of Shaftesbury, 2 P. Will. 103, 118, 120; Goodall *v.* Harris, 2 P. Will. 561, 562; *Ex parte* Hopkins, 3 P. Will. 152, and Mr. Cox's note; Hall *v.* Hall, 3 Atk. 721; Da Costa *v.* Mellish, West's R. 300; S. C. 2 Swanst. 533, 537, note; Reynolds *v.* Teynham, 9 Mod. R. 40; Wright *v.* Naylor, 5 Madd. R. 77.

⁵ *Ibid.*; Clark *v.* Clark, 8 Paige, R. 152; *in re* Spence, 2 Phillips, Ch. R. 247.

⁶ Mr. Hargrave, in his learned note, 66, § 12, 13, to Co. Litt. 88 b, has brought together the general principles and doctrine, applicable to guardianship by nature, guardianship by socage, and guardianship by nurture, the first and last of which are often confounded, and used in a loose and indeterminate sense. At the common law, guardianship by nature is of the heir-apparent only (and not of all the children), and belongs to the father and mother, and other ancestor, standing in

are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found, that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles;¹ or that his domestic associations are such as tend to the corruption and contamination of his children;² or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education.³ [But it is only in cases of gross misconduct,

that predicament to the infant. It lasts until twenty-one years of age, and extends no further than the custody of the infant's person. Guardianship by socage arises wholly out of tenure, and exists only when the infant is seized of lands or other hereditaments, lying in tenure and in socage. It extends to the person, and all the estates (including the socage estates) of the infant, and lasts until the infant arrives at the age of fourteen. It belongs to such of the infant's next of blood, as cannot have, by descent, the socage estate, in respect to which the guardianship arises by descent, without any distinction between the whole blood and the half blood. Guardianship by nature occurs only when the infant is without any other guardian; and none can have it, except the father or mother. It lasts until the age of fourteen years, and extends only over the person. See 1 Black. Comm. 461, 462; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 2, note (h).

¹ Fynn, *in re*, 12 Jurist, 713; Warde v. Warde, 2 Phillips, 786; Thomas v. Roberts, 14 Jurist, 639.

² See Anonymous, 2 Simons (N. S.) 54; 11 Eng. Law & Eq. R. 281; a very important case. But see Ball v. Ball, 2 Simons, 35.

³ The cases on this subject are numerous. Duke of Beaufort v. Berty, 1 P. Will. 703; Whitfield v. Hales, 13 Ves. 482; De Manneville v. De Manneville, 10 Ves. 59, 60, 62, 63; Shelley v. Westbroke, Jacob's R. 266; Lyons v. Blenkin, Jacob's R. 245; Roach v. Garvan, 1 Dick. R. 88; Lord Shipbrook v. Lord Hinchinbrook, 2 Dick. 547; Creuse v. Orby Hunter, 2 Cox, R. 242; Wellesley v. Duke of Beaufort, 2 Russ. R. 1, 20, 21; S. C. 2 Bligh (N. S.) p. 128 to 130, 141, 142; Com. Dig. Chancery, 3 O. 4, 5; Ball v. Ball, 2 Simons, R. 35; *Ex parte*, Mountfort, 15 Ves. 445. — The language, "to act as guardian," is here used with reference to the remark of Lord Eldon, in *Ex parte* Mountfort (15 Ves. 446), where his lordship said: "In certain cases the court will, upon petition, without a bill, appoint not a guardian, which cannot be during the father's life, but a person to act as guardian."

that paternal rights are interfered with.^{1]} As between husband and wife, the custody of the children generally belongs to the husband;² and the latter cannot, by an agreement with his wife, [or other persons,^{3]} alienate to her the right to the custody and care of the children.⁴

§ 1341 a. Considerations of another nature may often operate, in deciding who, as between the parents themselves, shall have the custody of the children of the marriage, in cases where the parents do not live together. Ordinarily, indeed, the father will be entitled to the custody of his infant children; [and it has been said that courts of *law* have no power to take legitimate minor children from the custody of the father.^{5]} Thus, for example, if the infant be a daughter and of very tender years, and the mother, under all the circumstances, be the most suitable to take care of her person and education, a court of chancery will confer the custody on the mother; when, if the infant were of riper years, and more discretion, and especially if a son, he would be intrusted for his education and superintendence to the custody and care of his father, if no real objection to his character or conduct existed.⁶

¹ Pulbrook, *in re*, 11 Jurist, 185.

² See North, *in re*, 11 Jurist, 7; Commonwealth v. Briggs, 16 Pick. 203.

³ Regina v. Smith, 16 Eng. Law & Eq. R. 221; Mayne v. Bredwin, 1 Halst. Ch. R. 454. But see *contra*, State v. Smith, 6 Greenl. 462; Pool v. Gott, 14 Law R. 269.

⁴ The People v. Mercein, 3 Hill, R. 399.

⁵ Hakeniel, *in re*, 12 Com. B. Rep. 223. And see *Ex parte* Skinner, 9 J. B. Moore, 278; King v. Greenhill, 6 N. & M. 244; Rex v. Morely, 5 East, 224, n.; Rex v. Hopkins, 7 East, 579.

⁶ *Ex parte* Wollstonecraft, 4 Johns. Ch. R. 80; *Ex parte* Waldron, 13 Johns. R. 419; *Ex parte* Schumpert, 6 Rich. 344; Woodward, *ex parte*, 17 Eng. Law & Eq. R. 77; The People v. Mercein, 8 Paige, R. 47, 55, 56. — In this last case Mr. Chancellor Walworth said: "The decision of the case, so far as respects the infant daughter of the relator, depends upon different principles; as, from her tender years, she is wholly incapable, at this time, of exercising any volition whatever in regard to her future residence. The court, therefore, must, for the present, decide that question for her with reference not only to her own immediate safety, but also with a due regard for her future welfare. In such a case as this, it is not material, perhaps, to inquire, whether the chancellor, in allowing the writ of *habeas corpus*, acts as a mere commissioner under the statute, or as a court, proceeding by virtue of an inherent power, derived from the common law, but regulated, in the exercise of that power, by the special provisions of the revised statutes on the subject. Were it necessary, however, I think there would be no difficulty in showing, that the power of the chancellor to issue a *habeas corpus* is

§ 1342. The jurisdiction, thus asserted, to remove infant children from the custody of their parents, and to superintend their education and maintenance, is admitted to be of extreme delicacy, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction which seems indispensable to the sound morals, the good order, and the just protection of a civilized society. On a recent occasion, after it had been acted upon in chancery for one hundred and fifty years, it was attempted to be brought into question, and was resisted, as unfounded in the true principles of English jurisprudence. It was, however, confirmed by the House of Lords with entire unanimity; and on that occasion was sustained by a weight of authority and reasoning rarely equalled.¹

§ 1343. It may not be without use to glance at some of the

not derived solely from the statute, but is also an inherent power in the court, derived from the common law; although the authority of this court, as well as of the Supreme Court, to award the writ, and to proceed thereon, is to be exercised in conformity to the several provisions of the revised statutes. (2 R. S. 573, § 73.) A writ of *habeas corpus ad subjiciendum*, however, is not either by the common law, or under the provisions of the revised statutes, the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant. This court, therefore, upon such a writ, will exercise its discretion in disposing of the custody of the infant, upon the same principles which regulate the exercise of a similar discretion, by other courts and officers, who are authorized to allow the writ in similar cases. And such was the decision of Chancellor Kent, in the case of *Wollstonecraft* (4 Johns. Ch. Rep. 80), referred to by the counsel on the argument. In the exercise of such a discretion, however, the natural rights of parents to the custody of their infant children are not wholly to be lost sight of, by the court or officer before whom the writ is returnable. And where, as in this case, it unfortunately happens that the parents are living separate from each other, either with or without a legal decree authorizing a suspension of matrimonial cohabitation, a summary inquiry, as to the relative merits and demerits of each, may frequently become necessary, to enable the court to make a proper disposition of their infant children, who are brought up on *habeas corpus*. For this reason it was, that the relator and the defendant, in the present case, were permitted to occupy the court for so many days in the investigation of the causes which have led to the separation between the relator and his wife; which causes, the defendant insists, are sufficient to justify the wife in her refusal to return to matrimonial cohabitation, and to authorize him, by the laws of this State, to give to her and her infant daughter shelter and protection." *U. S. v. Green*, 3 Mason, R. 482, 485; *The King v. De Manneville*, 5 East, R. 221; *De Manneville v. De Manneville*, 10 Ves. 52.

¹ *Wellesley v. Wellesley*, 2 Bligh (N. S.), 124, 128 to 145; S. C. 2 Russ. R. 1, 20, 21.

leading considerations suggested on that occasion.¹ The opposition to the jurisdiction was founded upon the right of the father to have the care and custody of his children. That right, in a general sense, is not to be disputed. But the true question is, whether the father, having that right, is to be at liberty to abuse it. Why is the parent, by law, ordinarily intrusted with the care of his children? Simply, because it is generally supposed that he will best execute the trust reposed in him; for that it is a trust, and of all trusts the most sacred, no one can well doubt.

§ 1344. In the case of ordinary guardians, there is no question as to the authority of the court. Even in the case of a guardian, appointed under the statute, which enables the father to appoint a guardian to his children, it is clear, that as a case of delegated trust, a trust, which the law has enabled the father, when he ceases to live, to give to others for the benefit of his children, the authority of the court to interfere, and to control the conduct of such a guardian, in case of any abuse, scarcely admits of dispute. What ground, then, is there to deny the like authority in the case of a parent?

§ 1345. Why is not the conduct of a father to be considered as a trust, as well as the conduct of a person as guardian? It is true that the law compels the father to maintain his infant children; but it does no more than compel a bare maintenance. He cannot be compelled, whatever his property may be, to allow to his children what might be deemed a liberal allowance for their maintenance and education; but only so much as is a bare maintenance. But if the children have property of their own, there exists a right to apply that property, which belongs to the children, most beneficially for their support and education.

§ 1346. Upon what ground is the court, in any case, required to maintain children out of their own property, and not at the expense of their father? It is because the father either has not the means, or is an improper person to have the care of his children. When it is proposed to take the maintenance and education of children out of his control, he may refuse to supply them with more than a bare maintenance; and yet it may be indispensable for their character, their morals, their interest, and their station in society, that they should receive a good education. It is for that

¹ The reasoning in the text is extracted from the very able opinion of Lord Redesdale, in *Wellesley v. Wellesley*, 2 Bligh, R. (N. S.), 128 to 141.

reason that the court takes upon itself to apply a part of their property for their suitable maintenance and education, instead of accumulating the income of it for their benefit, until they are capable of taking possession of it themselves. This jurisdiction of the court as to maintenance is unquestionable. It is a jurisdiction with respect to the income of the property of the children, to apply it for their benefit, and it stands upon the same general principles as other interferences of the court in cases of property.

§ 1347. It is impossible to say that the father has any such absolute right to the care and custody of his children, as the objection supposes. What are the grounds on which the custody of the children is given to the father? First, protection, then care, then education. Is it not clear, if the father does not give that protection, if he does not maintain the children, that the law interferes for the purpose of compelling the maintenance of the children? Is it not clear, if the father cruelly treats the children in any manner, that a court of criminal jurisdiction will interfere for the purpose of preventing that ill-treatment? Upon what ground, then, can it be said, that there is no jurisdiction whatsoever in the country which can control the conduct of the father in the education of his children? If such a defect could exist in our jurisprudence, it would strike all civilized countries with astonishment.

[* § 1347 *a*. This subject is very extensively discussed in a late English case,¹ and the following rules established. That the Court of Chancery have no jurisdiction to remove a child from the custody of the father or mother, merely because it would be for the benefit of the child. The peculiar religious opinions, or the poverty of the father, form no grounds for removing the child from his custody. Mere acts of harshness or severity, by a father, not such as would be injurious to the health, or the fact of a somewhat passionate temper, will not justify such removal.

§ 1347 *b*. However unwise or difficult of exercise some might, with show of reason, regard the interference of courts of equity with parental control over children, it will be admitted, we think, to be far less offensive than the indiscriminate control of a mere volunteer in regard to furnishing necessities to children upon the credit of the father, upon the alleged ground of such necessities not being furnished in proper measure by the father. And this

¹ [* *Curtis v. Curtis*, 5 Jur. N. S. 1147.

opinion, it is well known to the profession, has received the countenance of eminent jurists upon this side of the Atlantic.¹ Some early English cases, mostly at *nisi prius*, are cited in support of this opinion. But it is believed it receives very little countenance from English authority. Gould, J.,² says: "No man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother." And in the late case of *Mortimore v. Wright*,³ it is clearly and unqualifiedly declared, that the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts, even for such necessities as it was the duty of the father to have furnished, and when the child stands in immediate need of the same. The proper mode of proceeding is for the public authorities to bring process against the father, under the statute, to compel him to maintain his child. The English cases seem to establish the proposition that the father cannot be made liable for necessities furnished his child by volunteers, except by his own consent, either express or implied.⁴

§ 1347 c. Upon application for a decree of specific performance of a contract between the father of three infant children and the maternal grandmother of the children, the mother being dead, that the children should remain in England for nine months in the year in the custody of the father, and for the remaining portion of the time under the exclusive charge of the grandmother, it was decided, that specific performance of such a contract could not be decreed as to the first part of the stipulation, and that as to the second part, it was against public policy.⁵

§ 1347 d. It is said the court on appeal will seldom interfere with the discretion of the court below in regard to the appointment of guardians. But where a married woman was appointed sole guardian, and the appointment was in other respects objectionable, the Court of Appeal appointed two other persons in her stead.⁶]

¹ Chancellor Kent, 2 Comm. 191; Ch. J. Swift, 1 Dig. 41; Van Valkinburgh v. Watson, 13 Johns. 480.

² 2 Wm. B. Rep. 1325.

³ 6 M. & W. 482.

⁴ *Gordon v. Potter*, 17 Vt. R. 348, where the cases are reviewed.

⁵ *Kennedy v. May*, 7 Law T. N. S. 819.

⁶ *Re Kaye*, 12 Jur. N. S. 350.]

§ 1348. It is said that there is nothing from which this jurisdiction can be inferred as belonging to the Court of Chancery, except the dicta in the books, and the actual exercise of it in that court for one hundred and fifty years. The very circumstance of such an actual exercise of the authority for such a period is conclusive in favor of its rightful origin ; for, in many cases, under the constitution of England, no other ground, except the actual exercise of authority, can be assigned for its legitimacy. The origin cannot be ascertained. How came there to be a House of Lords and a House of Commons ? No one has been able to ascertain the exact origin of either. Much of the jurisdiction of the Court of King's Bench and of the Court of Exchequer is beyond the reach of any man to trace to its source, or to say when and how it originated.

§ 1349. The truth is, that, in the constitution of the government of England, all powers in the administration of justice which are necessary in themselves, are vested in the crown, and are so vested to be exercised by those ministers of the crown to whom the jurisdiction has usually been delegated. The present jurisdiction must be taken to be delegated to the Court of Chancery, whenever there is a suit respecting property in that court. If there was a suit respecting property in the Court of Exchequer, as a court of equity, to take care of property belonging to an infant, the Court of Exchequer would exercise that jurisdiction as an incident ; that is to say, it would take care that the property, which was to be administered under its direction, should be properly administered. Such is the general course of reasoning by which the jurisdiction of the Court of Chancery has been maintained and established in the highest appellate court of England.¹

§ 1350. It would be a subject of curious inquiry, to ascertain the nature and extent of the parental power in the Roman law, and also the nature and extent of the powers and duties of guardians in the same law, and the manner of their appointment ; but it would lead us too far from the immediate object of these commentaries. It is highly probable that the common law, as well as the equity jurisprudence of England, has borrowed many of its doctrines on this subject from this source. Guardians (who were appointed on the death of the father) were, in the Roman law, of two sorts : (1.) tutors, who were guardians of males until their

¹ See *Wellesley v. Wellesley*, 2 Bligh (N. S.), 128 to 141.

age of fourteen years, and of females until their age of twelve years; and (2.) curators, who were then appointed their guardians, and continued such until the minors respectively arrived at the age of twenty-five years, which was the full majority of the Roman law. Guardians were usually selected from the nearest relations, and might be nominated by the father or mother during their lifetime. But they were required to be appointed and confirmed by the proper judge or magistrate of the place where the minor resided; and they were removable for personal misconduct, or for ill treatment of the minor, or for bad management of his estate. But, while any one remained guardian, he was bound to take care of the person of the minor; to provide suitable maintenance out of his estate; to superintend his morals and education; and to exercise a prudent management over his estate.¹ In many respects, indeed, the Court of Chancery, in the exercise of its authority over infants, implicitly follows the very dictates of the Roman code.

§ 1351. It might seem, upon principle, that this jurisdiction of the Court of Chancery ought not to be confined to cases where a suit is depending for property in that court; although it might well be so confined as to other courts of equity in England.² It would seem to belong to the Court of Chancery, as the general delegate of the crown, acting as *parens patriæ*, for the protection of the persons and property of those who are unable to take care of themselves, and yet possess the means of maintenance, and are without any other suitable guardian;³ and upon that ground, that it ought to reach all cases where the person or the property of the infant required the protection of the court, without any inquiry whether there was a ground for actual litigation or not. But, in practice, it seemed to be limited to cases where a suit is actually pending in chancery upon a bill filed, even when the whole *gravamen* of the bill is a mere fiction.⁴

¹ See 1 Domat, B. 2, tit. 1, § 1 to 7; Dig. Lib. 26, tit. 1 to 10; Inst. Lib. 1, tit. 20 to 26, and Vinn. Comm. Ibid.; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 3.

² *Ante*, § 1349.

³ *Ante*, § 1333; *Duke of Beaufort v. Wellesley*; 2 Russ. R. 20, 22; *Wellesley v. Wellesley*, 2 Bligh (N. S.), 135 to 137; *Butler v. Freeman*, Ambler, R. 302; *Smith's Prac. in Chan.* (3d edition).

⁴ It often occurs, that a bill is filed for the sole purpose of making an infant a ward of chancery; but in such a case the bill always states, however untruly, that the infant has property within the jurisdiction, and the bill is brought against the

§ 1352. We are next led to the consideration of what constitutes an infant a ward of chancery, in respect to whom the court interferes in a great variety of cases, when it would not, if the infant did not stand in that predicament in relation to the court. Properly speaking, a ward of chancery is a person who is under a guardian appointed by the Court of Chancery.¹ But, wherever a suit is instituted in the Court of Chancery, relative to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance and protection.²

§ 1352 *a*. The power of the Court of Chancery to appoint a guardian, and make an infant a ward of the court, is not, it seems, limited to cases where the infant is domiciled in the country, and actually has property there; but reaches cases where the infant is but temporarily in the country, and all the property is in a foreign country. Thus an infant domiciled in Scotland, and having a guardian or tutor there, and being in England solely for purposes of education, has been held liable to be made a ward in chancery upon a bill filed in England, although the whole property is in fact in Scotland, and under the power of the guardian or tutor there.³

§ 1353. In all cases where an infant is a ward of chancery, no act can be done affecting the person, or property, or state of the minor, unless under the express or implied direction of the court itself.⁴ Every act done without such direction is treated as a vio-

person in whose supposed custody or power the property is. *Johnstone v. Beattie*, 10 Clarke & Fin. 42. Why such a mere fiction should be resorted to, has never, as it seems to me, been satisfactorily explained; and why the Lord Chancellor, exercising the prerogative of the crown as *parens patriæ*, might not, in his discretion, appoint a guardian to an infant, having no other guardian, without any bill being filed, seems difficult to understand upon principle. But the practice seems founded upon narrower ground.

¹ See *Goodall v. Harris*, 2 P. Will. 560, 562; 5 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (b). See *Hughes v. Science*, Ambler, R. 302, note.

² *Butler v. Freeman*, Ambler, R. 301; *Hughes v. Science*, Ambler, R. 302, in note; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 112; *Wright v. Naylor*, 5 Madd. R. 77; *Wellesley v. Wellesley*, 2 Bligh (N. S.), 137.

³ *Johnstone v. Beattie*, 10 Clarke & Fin. 42.

⁴ See *Goodall v. Harris*, 2 P. Will. 560, 562; *Daniel v. Newton*, 8 Beavan, 485; *Butler v. Freeman*, Ambler, R. 302, 303; *Hughes v. Science*, Ambler, R. 302, note; *Johnstone v. Beattie*, 10 Clarke & Fin. 42, 84, 85. In this case, Lord Lyndhurst said: "It is proper that I should state, that according to the uniform

lation of the authority of the court, and the offending party will be arrested upon the proper process for the contempt, and compelled to submit to such orders and such punishment by imprisonment, as are applied to other cases of contempt. Thus, for example, it is a contempt of the court to conceal or withdraw the person of the infant from the proper custody; to disobey the orders of the court in relation to the maintenance or education of the infant; or to marry the infant without the proper consent or approbation of the court.¹ Of the latter, more will be presently stated.² Indeed, when once the Court of Chancery has thus directly or indirectly assumed authority over the person or property of an infant, as its ward, it acts throughout with all the anxious care and vigilance of a parent; and it allows neither the guardian, nor any other person, to do any act injurious to the rights or interests of the infant.

§ 1354. In the next place, in regard to the maintenance of infants. Whenever the infant is a ward of chancery, and a suit is depending in the court, the court will, of course, upon petition, direct a suitable maintenance for the infant, having a due regard to the rank, the future expectations, the intended profession or employment, and the property of the latter.³ But, where there

course of the Court of Chancery, which I understand to be the law of that court, which has always been the law of that court, upon the institution of a suit of this description, the plaintiff, the infant, became a ward of the court,—became such ward by the very fact of the institution of the suit; and being a ward of the court, it was the duty of the court to provide for the care and protection of the infant, and as the court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the court, for the purpose of doing that on behalf of the court, and as the representative of the court, which the court cannot do itself personally. If there be a parent living within the jurisdiction of the court, or if there be a testamentary guardian within the jurisdiction of the court, the court, in that case, does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the court, precisely in the same way as an officer appointed by the authority of the court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so, as far as I have been able to understand and comprehend.”

¹ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, and notes (b), (c); *Hughes v. Science*, Ambler, R. 302, note (2); S. C. Macpherson on Infants, Appendix, I.

² *Post*, § 1358.

³ See *Wellesley v. Wellesley*, 2 Bligh (N. S.), 135 to 137.

is already a guardian in existence, not deriving his authority from the Court of Chancery, and where there is no suit in the court touching the infant or his property, (thus making the infant *quasi* a ward of the court,) there formerly existed much difficulty, on the part of the court, in interfering upon the petition, either of the guardian or of the infant, to direct a suitable maintenance of the latter. The effect of this doubt was to allow the guardian to exercise his discretion at his own peril; and thus to leave much to his sense of duty, and much more to his habits of bold or of timid action in assuming responsibility. At present, a different course is pursued; and, in ordinary cases, at least where the property is small, the court will, upon petition, without requiring the more formal proceedings by bill, settle a due maintenance upon the infant.¹ Lord Hardwicke, in vindication of this latter course, said: "There may be a great convenience in applications of this kind, because it may be a sort of check upon infants with regard to their behavior; and it may be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this court for anything they do on account of maintenance; and likewise of use, in saving the expense of a suit to an infant's estate."² These are considerations which certainly ought never to be lost sight of in regulating the practice of the court; for it seems not to be a question as to the jurisdiction of the court.

§ 1354 *a*. But, in regard to the maintenance of infants out of their own property, we are not to understand that it is to be allowed as a matter of course by a court of equity, either out of the income or the principal thereof. On the contrary, the court will examine into the circumstances of the case; and, if the father is of ability to maintain the infant out of his own property, the court will, ordinarily, withhold all allowance from the property or income of the infant for the maintenance of the latter.³ [But if the

¹ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, and note (*d*); *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Thomas, Ambler, R. 146; *Ex parte* Kent, 3 Bro. Ch. R. 88; *Ex parte* Salter, 2 Dick. R. 769; S. C. 3 Bro. Ch. 500; *Ex parte* Mountfort, 15 Ves. 445; *Ex parte* Myerscough, 1 Jac. & Walk. 152; *Corbett v. Tottenham*, 1 B. & Beatt. 59, 60; *Ex parte* Green, 1 Jac. & Walk. 253; *Ex parte* Starkie, 3 Sim. R. 339; *Ex parte* Lakin, 4 Russ. R. 307; *Ex parte* Molesworth, 4 Russ. R. 308, note; 1 Madd. Ch. Pr. 267, 268, 272; *Clay v. Pennington*, 8 Sim. R. 359; *Bridge v. Brown*, 2 Younge & Coll. New R. 181.

² *Ex parte* Whitfield, 2 Atk. 316.

³ *Thompson v. Griffin*, 1 Craig & Phillips, 317, 320. On this occasion, Lord Cottenham said: "If the property of the children had been derived from the

father is unable to support the infant, he may be allowed out of his estate; and if special circumstances exist, the father may be allowed for expenses of past maintenance.^{1]}

§ 1354 b. The court, also, is not limited in its authority in regard to maintenance, to cases where the infant is resident within

bounty of a stranger, there could be no doubt but that the father, being of ability to maintain his children, could not be entitled to any allowance out of the income of their property for that purpose; but the claim of the father rests upon the distinction, which has been taken between the cases in which the property of the children is derived from the bounty of a stranger and those in which they are entitled to it, under the marriage settlement of their parents, such as *Mundy v. Lord Howe*, *Stocken v. Stocken*, and *Meacher v. Young*. It appears to me, that the distinction between those two classes of cases has been carried quite as far as can be justified upon principle. In some of them, it has been said, that, in the case of marriage settlements, the father is a purchaser, and therefore entitled to an allowance for the maintenance of his children, and thereby to be relieved from the burden, which the law throws upon him of maintaining them himself. No doubt he is so, if the contract, contained in the settlement, gives him such a benefit; but, before he can be entitled to it, he must show that such was his contract. So, in the case of a legacy from a stranger, if the intention to be found in the construction of the will appears to have been that the father should have such a benefit, the court is bound to give it to him. In both cases, the question is one of construction and intention. In all the cases referred to, there were distinct and positive trusts to apply the income to the maintenance of the children, applicable, according to the construction put upon the whole of the provision, to the case of a surviving father. If, in these cases, the construction was correct, the order for maintenance must have been so; for, if the settlement had expressed in terms what the court thought it sufficiently expressed upon the construction of the whole of the provisions, there could be no doubt, but that such a trust would be carried into effect. In the present case, I find no such trust; I find, indeed, a power, and, in the case of the freehold property, which is vested in the infant, a mere power, at the discretion of the trustees, to apply part of that income, which would otherwise belong to the infants, for the purposes of their maintenance and education. If they do not exercise that power, the whole income belongs to the children. The father contends that he, by the authority of this court, can compel them to exercise that power, for the purpose of giving the whole or part of this income to him; this would be going far beyond any of the other cases. I cannot, upon this settlement, find any trust for the benefit of the father, or any contract, that he should be relieved out of the settled property, from the burden of supporting his children." See *Stocken v. Stocken*, 4 Sim. R. 152; S. C. 4 Mylne & Craig, 95; *Mundy v. Lord Howe*, 4 Bro. Ch. R. 223; *Meacher v. Young*, 2 Mylne & Keen, R. 490; *Bruin v. Knott*, 1 Phillips, Ch. R. 572; *Rice v. Tonnele*, 4 Sandford, Ch. R. 568. *In re Burke*, Id. 617.

¹ See *Carmichael v. Hughes*, 6 Eng. Law & Eq. R. 71. See, also, *Stopford v. Lord Canterbury*, 11 Sim. 82; *Bruin v. Knott*, 1 Phill. 572; [* *Sparhawk v. Buell's Ex'rs*, 9 Vt. 41.]

the territorial jurisdiction of the court, or the maintenance is to be applied there. But in suitable cases, and under suitable circumstances, it will order maintenance for an infant out of the jurisdiction, taking care to impose such conditions and restrictions on the party applying for it, as will secure a proper application of the money.¹

§ 1355. In allowing maintenance, the Court of Chancery will have a liberal regard to the circumstances and state of the family to which the infant belongs; as, for example, if the infant be an elder son, and the younger children have no provision made for them, an ample allowance will be allowed to the infant, so that the younger children may be maintained.² Similar considerations will apply to a father or mother of the infant, who is in distress or narrow circumstances.³ On the other hand, in allowing maintenance, the court usually confines itself within the limits of the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, the court will sometimes allow the capital to be broken in upon.⁴ But, without the express sanction of the court, a trustee or guardian will not be permitted, of his own accord, to break in upon the capital.⁵

[* § 1355 *a*. But where a father gave the trustees of a fund, for the maintenance and advancement of his son in the world, a discretion to advance all, or any part of the capital, "if he should conduct himself steadily and to the satisfaction of his trustees," and made a gift over in case the whole sum were not advanced, saying it was his wish that his son should have the whole benefit of such moneys, upon his good conduct; and the son assigned his interest

¹ *Stephens v. James*, 1 Mylne & Keen, 627; *Logan & Farlie*, Jacob, R. 193; *Jackson v. Hankey*, Jacob, R. 265; cited also in 1 Mylne & Keen, 627.

² 1 Fonbl. Eq. B. 2, ch. 2, § 1, note (*d*); *Harvey v. Harvey*, 2 P. Will. 21, 22; *Lanoy v. Duke of Athol*, 2 Atk. 447; *Petre v. Petre*, 3 Atk. 511; *Burnet v. Burnet*, 1 Bro. Ch. R. 179, and Mr. Belt's note.

³ *Roach v. Garvan*, 1 Ves. 160; *Bradshaw v. Bradshaw*, 1 Jac. & W. 647; 1 Madd. Ch. Pr. 275, 276; *Heysham v. Heysham*, 1 Cox, R. 179; *Allen v. Coster*, 1 Beavan, R. 201.

⁴ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*d*); *Barlow v. Grant*, 1 Vern. 255; *Harvey v. Harvey*, 2 P. Will. 22, 23; *Ex parte Green*, 1 Jac. & Walk. 253; 1 Madd. Ch. Pr. 276; *Walker v. Wetherell*, 6 Ves. 474; *In re England*, 1 Russ. & Mylne, 499; *Ex parte Swift*, 1 Russ. & Mylne, 575; *Clay v. Pennington*, 8 Simons, R. 359.

⁵ *Walker v. Wetherell*, 6 Ves. 474.

under the will; the trustees having paid the money into court, without saying that the son had not conducted himself to their satisfaction, in default of which it was considered they had a discretion to deprive him of the fund; it was held that, they having declined to exercise that power, it was not competent for the court to exercise it, and the fund was ordered to be transferred to the assignee.^{1]}

§ 1356. The Court of Chancery will exercise a vigilant care over guardians in the management of the property of the infant. It will carry its aid and protection in favor of infants so far, as to reach other persons than those who are guardians strictly appointed. For if a man intrudes upon the estate of an infant and takes the profits thereof, he will be treated as a guardian, and held responsible therefor, to the infant, in a suit in equity.²

§ 1357. Guardians will not ordinarily be permitted to change the personal property of the infant into real property, or the real property into personalty; since it may not only affect the rights of the infant himself, but also of his representatives, if he should die under age.³ But guardians may, under particular circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate; and the court will support their conduct, if the act be such as the court itself would have done, under the like circumstances, by its own order. The act of the guardian, in such a case, must not be wantonly done; but it must be for the manifest interest and convenience of the infant.⁴ It is true, that it has been said that there is no equity in such a case between the representatives of the infant. But nevertheless, the court has an obvious regard to the circumstance, that these representatives may be affected thereby;⁵ and it is always inclined to keep a strict

¹ [* *Coe's Trust*, *in re*, 4 K. & J. 199.]

² 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, and note (*f*); 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*); *Ante*, § 511.

³ 1 Madd. Ch. Pr. 269, 270; 1 Fonbl. Eq. B. 1, ch. 2, § 5, note (*b*); *Inwood v. Twyne*, Ambler, R. 417; S. C. 2 Eden, R. 148, and Mr. Eden's note.

⁴ *Inwood v. Twyne*, Ambler, R. 418, and Mr. Blunt's note; S. C. 2 Eden, R. 148, and Mr. Eden's note; 1 Madd. Ch. R. 269; *Mason v. Day*, Prec. Ch 319; 1 Fonbl. Eq. B. 1, ch. 2, § 5, note (*f*); *Tullit v. Tullit*, Ambler, R. 370; *Ex parte Grimstone*, Ambler, R. 708; *Pierson v. Shore*, 1 Atk. 480.

⁵ *Inwood v. Twyne*, Ambler, R. 418, and Mr. Blunt's note; S. C. 2 Eden, R. 147, 152, and Mr. Eden's note. See, also, *Oxenden v. Lord Compton*, 2 Ves. Jr. 69, 70; *Ware v. Polhill*, 11 Ves. 278; *Pierson v. Shore*, 1 Atk. 480; *Ex parte Grimstone*, Ambler, R. 707; S. C. 2 Ves. Jr. 235, note.

hand over guardians, in order to prevent partiality and misconduct.¹ For the purpose of preventing any such acts of the guardian, in case of the death of the infant before he arrives of age, from changing improperly the rights of the parties, who, as heirs or distributees, would otherwise be entitled to the fund, it is the constant rule of courts of equity to hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty, and distributable as such; and on the other hand, to treat real property (as, for example, timber cut down on a fee-simple estate of the infant) turned into money, as still, for the same purpose, real estate.² On these accounts, and also from the manifest hazard which guardians must otherwise run, it is common for them to ask the positive sanction of the court to any acts of this sort. And when the court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state.³

¹ Ibid.

² 1 Madd. Ch. Pr. 269, 270; *Gibson v. Scudamore*, 1 Dick. R. 45; S. C. Select Cas. in Ch. 63, and *Moseley*, R. 6; *Earl of Winchelsea v. Norcliffe*, 1 Vern. 434, and Mr. Raithby's note (3); *Tullit v. Tullit*, Ambl. R. 370; *Witter v. Witter*, 3 P. Will. 101, and Mr. Cox's note (1); *Rook v. Worth*, 1 Ves. 461; *Pierson v. Shore*, 1 Atk. 480, 481; *Mason v. Day*, Prec. Ch. 319; *Ex parte Grimstone*, cited 4 Bro. Ch. R. 235, note; *Ware v. Polhill*, 11 Ves. 278.

³ Ibid.; *Ashburton v. Ashburton*, 6 Ves. 6; *Sergeson v. Sealy*, 2 Atk. 413; *Webb v. Lord Shaftsbury*, 6 Madd. 100; *Ex parte Phillips*, 19 Ves. 122, 123; *Tullit v. Tullit*, Ambl. R. 370; 2 Fonbl. Eq. B. 1, ch. 2, § 5, note (f). In this respect the Court of Chancery acts differently, in cases of infancy, from what it does in lunacy. Lord Eldon, in *ex parte Phillips* (19 Ves. 122, 123), explained the difference and the reasons of it as follows: "In the case of the infant, the Lord Chancellor is acting as the Court of Chancery; not so in lunacy; but under a special, separate commission from the crown, authorizing him to take care of the property, and for the benefit of the lunatic. In the case of the infant, it is settled that, as a trustee out of court cannot change the nature of the property, so the court, which is only a trustee, must act as the trustee out of court; and, finding that a change will be for the benefit of the infant, must so deal with it as not to affect the powers of the infant over his property, even during his infancy, when he has powers over one species of property, not over the other. It may be for the benefit of an infant, in many cases, that money should be laid out in land, if he should live to become adult; but, if not, it is a great prejudice to him, taking away his dominion, by the power of disposition he has over personal property, so long before he has it over real estate. The court, therefore, with reference to his situation, even during infancy, as to his powers over property, works the change, not to all intents and purposes, but with this qualification, that, if he lives, he may

§ 1358. In the next place, in regard to the marriage of infants. This is a most important and delicate duty of the Court of Chancery, which it exercises with great caution in relation to all persons who are wards of the court. No person is permitted to marry a ward of the court without the express sanction of the court, even with the consent of the guardian. If a man should marry a female ward without the consent and approbation of the court, he, and all others concerned in aiding and abetting the act, will be treated as guilty of a contempt of the court;¹ and the husband himself, even though he were ignorant that she was a ward of the court, will still be deemed guilty of a contempt.²

take it as real estate; but without prejudice to his right over it during infancy, as personal property. A lunatic stands on quite a different footing. At the instant of a lucid interval, he has precisely the same power of disposition over one species of property as over the other, in different modes and forms I admit. The Lord Chancellor, acting under a special commission from the crown, does what is for his benefit; taking the advice and assistance of the presumptive next of kin and heir, as to the management of the property that may, or may not be, their own. A case has occurred of a lunatic, seised *ex parte* paternâ of estate A., and *ex parte* maternâ of estate B., the latter being subject to a mortgage; and, timber cut upon A. having been applied in discharge of the mortgage upon B., it was, on a question between the heirs, held, that A. was not to be recouped. Upon these grounds, had the application been, to sell a part of the real estate, for the payment of debts, the court, finding that the maintenance of the lunatic would be better provided for, and his advantage promoted, by disposing of a real estate, inconvenient, ill-conditioned, &c.; that it would be for his benefit so to pay the debts, and keep together the personal estate, would have no difficulty in making such an application; and so, in cutting down timber upon the estate, augmenting the personal property, it goes as personal property; and the different form of disposition is not regarded when a lucid interval arrives. Upon these principles, this sort of distinction, whether solid or not, is settled; and I think there is sufficient to maintain it; but, if settled, I have no inclination to disturb it." See, also, *Oxenden v. Lord Compton*, 2 Ves. Jr. 69, 70 to 78; *Ex parte Grimstone Ambler*, R. 707; *Ex parte Degge*, 4 Bro. Ch. R. 235, note. Some statute provisions have been made in England, on the subject of the estate of infants, and the rights of guardians relative thereto, which may be found succinctly stated in *Jeremy on Eq. Jurisd.* B. 1, ch. 5, § 3, p. 232, 233.

¹ *Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (b)*; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 111, 112, 115; *Butler v. Freeman*, *Ambl. R.* 302; *Edes v. Brereton*, *West, R.* 348; *More v. More*, 2 Atk. 157; *Herbert's case*, 3 P. Will. 116; *Hughes v. Science*, *Ambl. R.* 302, note; 1 *Madd. Ch. Pr.* 277, 278; *Nicholson v. Squire*, 16 Ves. 259.

² *Ibid.* Some auxiliary provisions, to secure due marriages and protection to infants, have been made by the Marriage Act of 4 Geo. IV. ch. 76, which, however, it is here unnecessary to enumerate. They are stated in *Jeremy on Eq. Jurisd.* B. 1, ch. 5, § 3, p. 225, 226.

§ 1359. In all cases where the Court of Chancery appoints a guardian, or committee in the nature of a guardian, to have the care of an infant, it is accustomed to require the party to give a recognizance that the infant shall not marry without the leave of the court; which form is rarely altered, and only upon special circumstances. So that, if an infant should marry, though without the privity, or knowledge, or neglect of the guardian, or committee; yet the recognizance would in strictness be forfeited, whatever favor the court might, upon an application, think fit to extend to the party, when he should appear to have been in no fault.¹

§ 1360. With a view, also, to prevent the improper marriages of its wards, the court will, where there is reason to suspect an intended and improper marriage without its sanction, by an injunction, not only interdict the marriage, but also interdict communications between the ward and the admirer; and if the guardian is suspected of any connivance, it will remove the infant from his care and custody, and place the infant under the care and custody of a committee.² Lord Hardwicke has justly remarked, that this jurisdiction is highly important in its exercise under both of these aspects; in the first place, when it is exercised by way of punishment of such as have done any act to the prejudice of the ward; in the next place, by the still more salutary and useful exercise, by way of prevention, when it restrains persons from doing any act to disparage the ward, before the act has been completed.³

§ 1361. In case of an offer of marriage of a ward, the court will refer it to a master, to ascertain and report, whether the match is a suitable one, and also what settlement ought to be made.⁴ And where a marriage has been actually celebrated without the sanction of the court, the court will not discharge the husband, who has been committed for the contempt, until he has actually made such a settlement upon the female ward, as, upon a reference to a master, shall, under all the circumstances, be deemed equitable and proper.⁵ It will not make any difference in

¹ *Eyre v. Countess of Shaftesbury*, 2 P. Will. 112; *Dr. Davis's case*, 1 P. Will. 698.

² *Smith v. Smith*, 3 Atk. 304; *Pearce v. Crutchfield*, 14 Ves. 206; *Beard v. Travers*, 1 Ves. 313; *Shipbrook v. Hinchinbrook*, 2 Dick. 547, 548; *Roach v. Garven*, 1 Dick. 88.

³ *Smith v. Smith*, 3 Atk. 305.

⁴ *Ibid.*

⁵ 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (b); *Stevens v. Savage*, 1 Ves. Jr

the case, that the ward has since arrived of age, or is ready to waive her right to a settlement; for the court will protect her against her own indiscretion, and the undue influence of her husband.¹

CHAPTER XXXVI.

IDIOTS AND LUNATICS.

[* § 1362. The crown is the guardian of idiots and lunatics.

§ 1363. Proceedings, by commission, under the sign-manual.

§ 1364. In many things the authority is derived from the court.

§ 1364 *a.* Chancellor may consent for lunatic to bar entail.

§ 1365. Manner of executing commission of lunacy.

§ 1365 *a.* Commission may issue where lunatic resides abroad.

§ 1365 *b.* Estate liable under order of chancery for his support.

§ 1365 *c.* Persons of weak mind may sue for protection in chancery.]

§ 1362. WITH this brief exposition of the jurisdiction and doctrine, 154; *Winch v. James*, 4 Ves. 386; *Bathurst v. Murray*, 8 Ves. 74, 78; *Ball v. Coutts*, 1 V. & Beam. 300, 301, 306; 1 Madd. Ch. Pr. 279 to 281.

¹ *Ibid.*; *Stackpole v. Beaumont*, 3 Ves. 98. What the settlement should be, must necessarily vary with the circumstances of the parties, and the nature of the case. On this point, Mr. Jeremy has well summed up the general result of the authorities. *Jeremy on Eq. Jurisd.* B. 1, ch. 5, § 3, p. 280, 281. [*It is scarcely necessary to say, that the foregoing decisions, in regard to the interference of courts of equity, in securing a proper marriage for its infant wards, or more properly speaking, to prevent improper ones, have very little to do with the practice, or indeed with the powers, of a court of equity in this country. The most which a court of equity here would ever attempt to accomplish in this way would be to secure a proper settlement for the maintenance of its wards out of their own estate, in case of marriage. This, it is believed, would be done by courts of equity in this country, where there appeared any necessity for their interference, on account of an improvident marriage having been accomplished, or perhaps when one was in contemplation. We believe the courts of equity would not generally, in this country, interfere to decree a settlement of the wife's property for her own separate maintenance, even where she was an infant and a ward of the court, unless there were some suggestion of the marriage being improvident, or of there having been some stipulation to that effect, although in *Eyre v. Countess of Shaftesbury*, Gilb. Rep. 172, it is said that the contempt consists in marrying without the consent of court, and that "an improvident marriage is only an aggravation of the offence." The principles above stated as the American view of the subject, seem to be recognized in *Kenny v. Udall*, 5 Johns. Ch. R. 464, 473; *S. C.* in error, 3 Cowen, R. 591; *Van Epps v. Van Deusen*, 4 Paige, 64; *Van Duzer v. Van Duzer*, 6 Paige, 366. See also *Chambers v. Perry*, 17 Alab. R. 726.]

trines of the Court of Chancery in regard to infants, we may dismiss the subject, and proceed to the consideration of the jurisdiction in relation to IDIOTS and LUNATICS. The remarks, which have been already made, to distinguish the jurisdiction of the court in this class of cases from that exercised in cases of infants, have, in a great measure, anticipated, and brought under discussion, the explanations proper for this place.¹ If the preceding views of this subject are correct, the Court of Chancery may be properly deemed to have had, originally, as the general delegate of the authority of the crown, as *parens patriæ*, the right, not only to have the custody and protection of infants, but also of idiots and lunatics, when they have no other guardian.²

§ 1363. But the statutes of 17 Edward II. ch. 9, 10, introduced some new rights, powers, and duties of the crown; and since that period, the jurisdiction has become somewhat mixed in practice; but it is principally, in modern times, exerted under these statutes. The jurisdiction, therefore, is now usually treated as a special jurisdiction for many purposes, (certainly not for all,) derived from the special authority of the crown, under its sign-manual, to the chancellor personally, and not as belonging to him as chancellor, or as sitting in the Court of Chancery. So that (it has been said) the sign-manual does not confer on him any jurisdiction but only a power of administration.³ From this circumstance, (as we have seen,) the practice under the two branches of the jurisdiction is not the same, nor are the doctrines of the judge the same in all respects.⁴ Still, for the most part, they agree in substance; and, in a work like the present, there would be little utility in a more minute and comprehensive enumeration of the distinctions and differences between them.

§ 1364. But whatever may be the true origin of the authority of the crown, as to idiots and lunatics, it is clear that the chancellor does not, in all cases, act under the special warrant by the sign-manual. The warrant gives to the chancellor the right of

¹ *Ante*, § 1334 to 1336, and notes.

² *Ante*, § 1335, 1336; *Beverley's case*, 4 Co. R. 126; 1 Black. Comm. 303; *Ex parte Grimstone*, Ambler, R. 707; S. C. cited 2 Ves. Jr. 235, note; *Ex parte Degge*, 4 Bro. Ch. R. 235, note; *Oxenden v. Lord Compton*, 2 Ves. Jr. 71; *Eyre v. Countess of Shaftesbury*, 2 P. Will. 118, 119; *Cary v. Bertie*, 2 Vern. 342, 348; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a).

³ *Ex parte Phillips*, 19 Ves. 122; *Oxenden v. Lord Compton*, 2 Ves. Jr. 72.

⁴ *Ante*, § 1336, and notes.

providing for the maintenance of idiots and lunatics, and for the care of their persons and estates ; and no more.¹ When a person is ascertained to be an idiot or lunatic,² the chancellor proceeds, under his special warrant, to commit the custody of the person and estate of the idiot or lunatic, sometimes to the same person, and sometimes to different persons, according to circumstances, and to direct for him a suitable maintenance.³ After the custody is so granted, and maintenance is assigned, the chancellor acts in other matters, relative to lunatics, at least,⁴ not under the warrant by the sign-manual, but in virtue of his general power, as holding the great seal, and keeper of the king's conscience. It is usual, indeed, to take bond from the committees to account and submit to the orders of the Court of Chancery ; but it is not absolutely necessary so to do. The Court of Chancery is in the habit of making many orders, and enforcing them by attachment ; which orders, and the manner of enforcing them, are not warranted by the sign-manual ; but are warranted by the general power of the court.⁵

¹ *Lysaght v. Royse*, 2 Sch. & Lefr. 153. In order that the chancellor should deal with the property of a lunatic at all, it is necessary that a commission should be taken out, or that the lunatic should be a party in a cause ; otherwise the court has no jurisdiction. *Gilbee v. Gilbee*, 1 Phillips, Ch. R. 121.

² [As to the jurisdiction of chancery to interfere for the protection of a lunatic not found so by inquisition, see *Nelson v. Duncombe*, 9 Beav. 214.]

³ *Dormer's case*, 2 P. Will. 263 ; *Sheldon v. Fortescue*, Aland, 3 P. Will. 110 ; *Lysaght v. Royse*, 2 Sch. & Lefr. 153 ; *Ex parte Chumley*, 1 Ves. Jr. 296 ; *Ex parte Baker*, 6 Ves. 8 ; *Ex parte Pickard*, 3 Ves. & B. 127. In the matter of *Webb*, 2 Phillips, Ch. R. 10.

⁴ See *Lysaght v. Royse*, 2 Sch. & Lefr. 153.

⁵ *Ante*, § 1335 ; *Ex parte Grimstone*, Ambler, R. 707 ; *Ex parte Degge*, 4 Bro. Ch. R. 235, note ; *Ex parte Fitzgerald*, 2 Sch. & Lefr. 432, 438 ; *Oxenden v. Lord Compton*, 2 Ves. Jr. 69 ; S. C. 4 Bro. Ch. R. 231 ; *Nelson v. Duncombe*, 9 Beavan, R. 211. Lord Redesdale, in *Ex parte Fitzgerald* (2 Sch. & Lefr. 438), has gone at large into the subject. The following extract sufficiently illustrates the text : "The issuing of the commission is under the direction of the great seal, and the care and custody of the person and estate is a matter which, after the abolition of the Court of Wards and Liveries, seems to have fallen back to the crown, to be provided for upon a special application for the purpose. At the same time, the duty thus thrown on the crown was often difficult. It was to be performed by the crown according to the advice upon which the king might constitutionally act, and it has, therefore, long been the practice, from time to time, to authorize, by the king's sign-manual, the person holding the great seal, to exercise the discretion of the crown in providing for the care and custody of the persons and estates of lunatics, which has been usually done by grants to committees. But I apprehend, that, though the discretion of the crown has been thus delegated to the person holding

[* § 1364 *a*. By the present construction of the English statute,¹ the Lord Chancellor has authority to give consent, on the part of a lunatic, tenant in tail in possession, that the first tenant in tail in remainder may bar the subsequent limitations, on a proper case being made out for the exercise of that authority.² In the case of

the great seal, yet the superintendence of the conduct of the committee in the management, both of the property and the person, originates in the authority of the court itself, as the court, from which the commission, inquiring of the lunacy, issues, and into which the inquisition is returned and which makes the grant founded on the inquisition; for which grant the sign-manual (which is countersigned by the lords of the treasury) is a general warrant. The reason, given in the warrant, for delegating the power of appointing the committee, to the person holding the great seal, is, because the jurisdiction of issuing the commission and, consequently, of acting upon it, is, by law, in the great seal. And I conceive, that the warrant itself implies no more; and that nothing is communicated by it, but simply the selection of the person, to whom the grant shall be made. But, as the king is bound, in conscience, to execute the trust reposed in him by the statute, and cannot do it otherwise than by bailiff, the chancellor, or person holding the great seal, is the proper authority to direct and control the authority of the person so appointed bailiff. It is the duty, therefore, of the person holding the great seal, to see that the committee does not use his office to the prejudice of the lunatic in his lifetime, or of those entitled to his property after his death; that being manifestly the duty of the crown, imposed by the law, investing it with the care of persons in this situation." There is some obscurity, from the language used in the books, as to the point, whether the Lord Chancellor acts as administering the general powers of a court of equity, technically speaking, as to the orders and decrees which he makes in cases of lunacy, or only as keeper of the king's conscience, and delegate of the crown, or *virtute officii* as chancellor, in cases beyond the special commission. The truth seems to be, that he acts merely as delegate of the crown, and exercising its personal prerogative, as *parens patriæ*, in chancery, and not as a court of equity. Hence it is, that, from his orders and decrees, in cases of lunacy, an appeal lies to the king in council; whereas, if he acted in such cases as a court of equity, an appeal would lie, from said orders and decrees, to the House of Lords. See *Sheldon v. Fortescue*, Aland, 3 P. Will. 107, and note; *Oxenden v. Lord Compton*, 2 Ves. Jr. 69; S. C. 4 Bro. Ch. R. 235; *Sherwood v. Sanderson*, 19 Ves. 285. Yet the language used in *Ex parte Grimstone*, Ambler, R. 707, and in 2 Sch. & Lefr. 438, above cited, might lead to an opposite result.

¹ [* 3 & 4 Will. 4, c. 74.

² *In re Blewitt*, 6 De G. M. & G. 187. This case was heard before the Lord Chancellor and the Lord Justices, on appeal, and the former decisions, *Re Blewitt*, 3 Myl. & K. 250, and *Re Wood*, 3 Myl. & Cr. 266, were overruled. The more common practice in the American States, where a conveyance of the title of the lunatic to real estate is required, is for the guardian of the lunatic to petition the court having jurisdiction, for leave to dispose of the estate of the ward, which, in practice, amounts to the same thing.

a devise of real and personal estate, to trustees, to apply the whole, or any part of the rents, to the maintenance of an imbecile person, it was held that the trustees could not interpose their discretionary power to oust the jurisdiction of the court; and that the trust was in exoneration of the private property of the *cestui que trust*, so that his personal representative might claim to have recouped out of the income of the trust property any sum which he may have applied out of the private property of the imbecile towards his maintenance.^{1]}

§ 1365. In regard to the manner of ascertaining whether a person is an idiot or lunatic, or not, a few words will suffice. Upon a proper petition addressed to the chancellor, not as such, but as the person acting under the special warrant of the crown,² a commission issues out of chancery,³ on which the inquiry is to be made, as to the asserted idiocy or lunacy of the party.⁴ The inquisition is always had, and the question tried by a jury, whose unimpeached verdict becomes conclusive⁵ upon the fact.⁶ The commission is not confined to idiots or lunatics, strictly so called; but in modern times it is extended to all persons who, from age, infirmity, or other misfortune, are incapable of managing their own affairs,⁷ and therefore are properly deemed of unsound mind, or *non compotes mentis*.⁸

¹ *In re Sanderson's Trust*, 3 Kay & J. 497. See also *Cope v. Wilmot*, 1 Coll. 396, note a, which is here commented upon.]

² See *Sherwood v. Sanderson*, 19 Ves. 285.

³ This commission will be issued to such person as is most likely to bring out the whole truth as to the lunacy. *In re Webb*, 2 Phillips, Ch. R. 10, 245; 2 Cooper, 145.

⁴ *Lysaght v. Royse*, 2 Sch. & Lefr. 153; *Ex parte Fitzgerald*, 2 Sch. & Lefr. 438. In the matter of *Webb*, 2 Phillips, Ch. R. 10; in the matter of *Joanna Gordon*, 2 Ibid. 242.

⁵ See *Rogers v. Walker*, 6 Barr. 371.

⁶ In New York, it has been said, the court might issue a new commission, if it appeared that the jury upon the first commission manifestly erred in their decision. *In re Lasher*, 2 Barb. Ch. R. 97. [* But in most of the States, equity exercises no general jurisdiction over either the person or property of lunatics. *Dowell v. Jacks*, 5 Jones, Eq. R. 417.]

⁷ See *Monaghan, in re*, 3 Jones & Lat. 258.

⁸ *Gibson v. Jeyes*, 6 Ves. 273; *Ridgway v. Darwin*, 8 Ves. 66; *Ex parte Cranmer*, 12 Ves. 446; *Sherwood v. Sanderson*, 19 Ves. 285. Some statutes have, in modern times, been passed in England, relating to idiots, lunatics, and persons *non compotes mentis*, authorizing certain acts to be done on their behalf by the committee, under the direction of the Court of Chancery. They will be found summarily stated in *Jeremy on Eq. Jurisd. B. 1, ch. 4, p. 213, 214.*

§ 1365 *a*. The jurisdiction of the Court of Chancery over lunatics is not confined to lunatics domiciled within the country; but a commission of lunacy may issue where the lunatic has lands or other property within the State, although he is domiciled abroad.¹

[* § 1365 *b*. And where a person of unsound mind had been maintained in a lunatic asylum, by his parish, a portion of the capital of a fund belonging to him was ordered by the vice-chancellor, acting under his general chancery-powers, to be paid in satisfaction of the claim for this support. A query is here raised by the court, upon reviewing the cases upon that subject, how far it is proper for them to order capital expended in support of the lunatic, or the payment of his debts. But it is finally assumed, that the court has a discretion to order such payment as it may deem most for the benefit of the lunatic.²

§ 1365 *c*. Suits are sometimes entertained in the English courts of equity on behalf of persons of weak mind, brought by next friend, where no commission of lunacy had been obtained, and decree made for the protection of the plaintiff's property, and liberty given to apply in lunacy as to its application.³]

CHAPTER XXXVII.

MARRIED WOMEN.

[* § 1366, 1367. Disabilities of married women, at law.

§ 1367 *a*. The wife's personalty vests in the husband.

§ 1368. In equity, husband and wife treated as distinct persons.

§ 1369. Distribution of the subject into several heads.

§ 1370. Equity will enforce contracts between husband and wife.

§ 1371. Contracts to take effect after coverture ceases.

§ 1372. Post-nuptial agreements binding in equity.

§ 1372 *a* - 1372 *b*. Equity will protect wife's property in husband's possession.

§ 1373. Equity will treat the wife as creditor of the husband.

§ 1374. Will uphold conveyances from husband to wife.

§ 1375. Will protect wife's pin-money.

§ 1375 *a*. But this is personal to the wife.

¹ Southcote's case, 2 Ves. 402; Perkins's case, 2 Johns. Ch. R. 121; Petit's case, 2 Paige, R. 174. In the matter of Gause, 9 Paige, R. 416. In the matter of the Princess Bariantinski, 1 Phillips, Ch. R. 375. *In re Fowler*, 2 Barb. Ch. R. 305.

² [* Buckley's Trust, *in re*, Johnson's R. 700.

³ *Light v. Light*, 25 Beavan, 248. See also *Conduit v. Soane*, 5 Myl. & Cr. 111; *In re Berry*, 13 Beavan, 455; *In re Irby*, 17 Beavan, 334.]

- § 1376. The widow's paraphernalia.
- § 1377. Paraphernalia received from the husband, or others.
- § 1377 a. Settlements, after marriage, on consideration, good.
- § 1378. Equity recognizes the wife's right to separate estate.
- § 1379. This may be secured, by contract, before marriage, or even after marriage.
- § 1380. Intervention of trustees not indispensable.
- § 1381. How property shall be so secured, difficult to define.
- § 1382. Must be clear intent to put it beyond control of husband.
- § 1382 a. Wife's control may also be limited.
- § 1383. Equivocal words do not exclude marital rights.
- § 1384. Gifts to separate use of unmarried women.
- § 1385. Wife may carry on trade separate from her husband.
- § 1386. Agreements for separate trade after marriage.
- § 1387. Equity enforces such contracts without trustees.
- § 1388. Right of the wife to dispose of her separate estate.
- § 1389. Distinction between control of real and personal estate.
- § 1390. That distinction now abandoned.
- § 1391. Husband's consent during coverture only binds his interest.
- § 1392. Wife's control over real estate acquired during coverture.
- § 1393. Her control over personal, and income of real, estate.
- § 1394. What estates vest absolutely in wife.
- § 1395. Wife may dispose of her separate estate to husband.
- § 1396. Court will aid the wife in such cases.
- § 1397. Can only bind her separate property in equity.
- § 1397 a. What language sufficient to exclude marital rights.
- § 1398. This not liable for her general engagements.
- § 1399. But only for such debts as are charged thereon.
- § 1399 a. How far her contracts to convey are valid and binding.
- § 1400, 1401 a. The fact of contracting a debt ought presumptively to make it a charge on her separate estate.
- § 1401. What contracts of wife are a charge on her separate estate.
- § 1401 a. Latest decisions upon the question.
- § 1401 b. Subject further discussed with reference to later cases.
- § 1401 c. The labor of married woman and her children may be secured to her separate use.
- § 1402. Husband's legal control over wife's estate.
- § 1403. Equity will not ordinarily interfere with husband's control.
- § 1404, 1405. But when it comes into equity, that court will secure the wife's maintenance.
- § 1406. This extends also to the issue of the marriage.
- § 1407 - 1409 b. It seems to be but a reasonable protection.
- § 1408. It extends to all cases where the husband seeks aid in equity.
- § 1408 a. Equity will interfere where there is an attempt to evade the jurisdiction.
- § 1409. This will not be done contrary to the law of the domicile of the parties.
- § 1409 a. Questions affecting domicile.
- § 1410. Husband may dispose of wife's leasehold estate held by trustees.
- § 1411. Husband's assignees take subject to wife's equity.
- § 1412. This extends also to *bonâ fide* special assignees and purchasers.
- § 1413. So also as to her equitable reversionary interests.
- § 1414. The settlement will be decreed in such cases, at the wife's suit.
- § 1415. Mode of enforcing the wife's support.
- § 1416. How wife's equity to settlement waived.

- § 1417. This is personal to the wife.
- § 1418. Wife may waive settlement, unless she was a ward of court.
- § 1419. She may also forfeit this right by misconduct.
- § 1419 *a*. But court will not change a settlement for that reason.
- § 1420. Nor withhold a settlement stipulated before marriage.
- § 1421, 1421 *a*. When payment for wife's alimony decreed.
- § 1421 *b*. How payments made when wife becomes lunatic.
- § 1422. Courts of equity cannot decree alimony to wife.
- § 1423. Proceedings where wife asks security of the peace.
- § 1423 *a*. In America this is done, for defect of legal remedy.
- § 1424. And equity will apply equitable estate for alimony.
- § 1425. So, if there has been an express contract.
- § 1426. Equity will not aid the wife when in fault.
- § 1427. Will not enforce articles of separation.
- § 1428. Construction and enforcement of deeds of separation.
- § 1428 *a*. Equity cannot restore conjugal rights.
- § 1429. Equity in its application to this relation.]

§ 1366. WE shall now consider the peculiar remedies afforded by courts of equity affecting the rights and interests of married women.

§ 1367. At common law, husband and wife are considered, for most purposes, as one person. This union of person produces many disabilities in the wife, whose legal existence is merged in that of her husband, in a strictly legal view.¹ For this reason, a man cannot grant anything to his wife, or enter into a covenant with her; for the grant would be, to suppose her to possess a distinct and separate existence. And, therefore, it is also generally true, that contracts made between husband and wife, when single, are avoided by the intermarriage.² Upon the same ground it is, that, if the wife be injured in her person or property during the marriage, she can bring no action for redress without the concurrence of her husband, neither can she be sued, without making her husband also a party in the cause.³ All this is very different in the civil law, where the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debt, and injuries;⁴ and may also, by agreement with each other, have a community of interest, in the nature of a partnership.

¹ 1 Black. Comm. 442. I have qualified Blackstone's text by adding the words "for most purposes"; for, in some respects, even at law, she is treated as a distinct person; as, for example, she may commit crimes separately from her husband; she may act as an attorney for him, or for others; she may levy a fine; she may swear articles of peace against him.

² Ibid.

³ 1 Black. Comm. 443.

⁴ Ibid. 444; 1 Fonbl. Eq. B. 1, ch. 2, § 6, and note (*h*).

§ 1367 *a*. It is also a settled rule of the common law, founded in like principles, that, in virtue of the marriage, the husband becomes entitled to all the personal estate, including the *choses in action* of the wife, and may appropriate the whole to his own use. Hence, if a promissory note or bond be given to a woman before marriage by a third person, to secure an annuity to her, upon her subsequent marriage, her husband may release the note or bond, and by the release of the security, the annuity itself is gone.¹ It would be otherwise, if the annuity were secured on land, for then the husband could not release it without the concurrence of his wife; and, in order to extinguish the security, she must join with him in levying a fine of the land.²

§ 1368. Now, in courts of equity, although the principles of law, in regard to husband and wife, are fully recognized and enforced in proper cases, yet they are not exclusively considered. On the contrary, courts of equity, for many purposes, treat the husband and wife as the civil law treats them, as distinct persons, capable (in a limited sense) of contracting with each other, of suing each other, and of having separate estates, debts, and interests.³ A wife may, in a court of equity, sue her husband, and be sued by him.⁴ And in cases respecting her separate estate, she may also be sued without him;⁵ although he is ordinarily required to be joined for the sake of conformity to the rule of law, as a nominal party, whenever he is within the jurisdiction of the court, and can be made a party.⁶

§ 1369. In the further illustration of this subject, we shall consider, first, the cases in which contracts between husband and wife will be recognized and enforced in equity; secondly, the manner in which a wife may acquire a separate estate, and her powers and interest therein; thirdly, the equity of the wife to a settlement out of her own property, not reduced into the possession of her husband; and, fourthly, her claim in equity for maintenance and alimony.

¹ *Hare v. Beecher*, 12 Simons, R. 465, 467.

² *Ibid.*

³ *Arundell v. Phipps*, 10 Ves. 144, 149; *Livingston v. Livingston*, 2 Johns. Ch. R. 539.

⁴ *Cannel v. Buckle*, 2 P. Will. 243, 244.

⁵ *Dubois v. Hole*, 2 Vern. 613, and Mr. Raithby's note (1). See *Travers v. Bulkeley*, 1 Ves. 383; 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (*k*) and (*p*); *Brooks v. Brooks*, Prec. Ch. 24; *Kirk v. Clark*, Prec. Ch. 275; *Lampert v. Lampert*, 1 Ves. Jr. 21; *Griffith v. Hood*, 2 Ves. 452.

⁶ See *Lilia v. Airey*, 1 Ves. Jr. 278; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*p*).

§ 1370. And first, in regard to contracts between husband and wife. By the general rules of law, as has been already stated, the contracts made between husband and wife before marriage, become, by their matrimonial union, utterly extinguished.¹ Thus, for example, if a man should give a bond to his wife, or a wife to her husband, before marriage, the contract created thereby would, at law, be discharged by the intermarriage.² Courts of equity, although they generally follow the same doctrine, will, in special cases, in furtherance of the manifest intentions and objects of the parties, carry into effect such a contract made before marriage between husband and wife, although it would be avoided at law.³ An agreement, therefore, entered into by husband and wife, before marriage, for the mutual settlement of their estates, or of the estate of either upon the other, upon the marriage, even without the intervention of trustees,⁴ will be enforced in equity, although void at law;⁵ for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract.⁶ On this ground, where a wife, before marriage, gave a bond to her intended husband, that, in case the marriage took effect, she would convey her estate to him in fee, the bond was, after the marriage, carried into effect in equity, although it was discharged at law. Upon that occasion the Lord Chancellor said: "It is unreasonable that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond. And the foundation of that notion is, that at law the husband and wife, being one person, the husband cannot sue the wife on this agreement; whereas, in equity, it is constant experience that the husband may sue the wife, or the wife the husband; and the husband might sue the wife upon this very agreement."⁷

¹ Co. Litt. 112 *a*, 187 *b*; Com. Dig. *Baron & Feme*, D. 1; *Ante*, § 1367.

² Com. Dig. *Baron & Feme*, D. 1; Cro. Car. 551; Co. Litt. 264 *b*.

³ *Rippon v. Dowding*, Ambler, R. 566, and Mr. Blunt's note.

⁴ *Strong v. Skinner*, 4 Barbour, 546.

⁵ See *Neves v. Scott*, 9 How. U. S. R. 196; *Imlay v. Huntington*, 20 Conn. 146; *West v. Howard*, 20 Conn. 581; *De Barante v. Gott*, 6 Barbour, 492; *Healy v. Rowan*, 5 Grattan, 414.

⁶ *Moore v. Ellis*, Bunb. B. 205; *Fursor v. Penton*, 1 Vern. 408; *Cotton v. Cotton*, Prec. Ch. 41; S. C. 2 Vern. 290, and Mr. Raithby's note; *Bradish v. Gibbs*, 3 Johns. Ch. R. 523, 540 to 547; 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (*n*) and (*o*).

⁷ *Cannel v. Buckle*, 2 P. Will. 243, 244; S. C. 2 Eden, R. 252 to 254.

§ 1371. Even at law a bond, given by a husband to his intended wife, upon a condition not to be performed in his lifetime (as, for instance, to leave her at his death £ 1,000), would not be extinguished by the intermarriage; for marriage extinguishes such contracts only as are for debts or things, which are due *in præ-senti*, or *in futuro*, or upon a contingency which may occur during the coverture. But where the debt or thing cannot be due until after the coverture is dissolved, the contract is only suspended, and not extinguished during the coverture.¹ *A fortiori*, such an agreement would be specifically decreed in a court of equity.² Therefore, where a husband covenanted before marriage with his intended wife, that she should have power to dispose of £ 300 of her estate, he was afterwards held bound specifically to perform it.³ The wife may even execute a power to dispose of property so reserved to her, in favor of her husband.⁴

§ 1372. In regard to contracts made between husband and wife after marriage, *à fortiori*, the principles of the common law apply to pronounce them a mere nullity; for there is deemed to be a positive incapacity in each to contract with the other. But here again, although courts of equity follow the law, they will, under particular circumstances, give full effect and validity to post-nuptial contracts.⁵ Thus, for example, if a wife, having a separate estate, should, *bonâ fide*, enter into a contract with her husband, to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, would be held obligatory, and would be enforced in equity.⁶

¹ *Gage v. Acton*, Com. Rep. 67, 68; S. C. 1 Lord Raym. 516; S. C. 1 Salk. 325; *Milbourn v. Ewart*, 5 T. Rep. 381; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n).

² *Acton v. Acton*, Prec. Ch. 237; S. C. 2 Vern. 480; *Watkins v. Watkins*, 2 Atk. 96; *Prebble v. Boghurst*, 1 Swanst. R. 318, 319; *Lampert v. Lampert*, 1 Ves. Jr. 21; Com. Dig. *Baron & Feme*, D. 1; Id. *Chancery*, 2 M. 11; *Newland on Contr.* ch. 6, p. 111, 112; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); *Rippon v. Dawding*, Ambler, R. 566, and Mr. Blunt's note. There are some early cases the other way, but they are now overruled. *Darcey v. Chute*, 1 Ch. Cas. 21; *Pridgeon v. Executors of Pridgeon*, 1 Ch. Cas. 117, 118.

³ *Fursor v. Penton*, 1 Vern. 408, and Mr. Raithby's note; *Wright v. Cadogan*, 2 Eden, R. 252; Com. Dig. *Baron & Feme*, D. 1; *Chancery*, 2 M. 31 *Bradish v. Gibbs*, 3 Johns. Ch. R. 540, 544.

⁴ *Bradish v. Gibbs*, 3 Johns. Ch. R. 523, 536. But see *Milnes v. Busk*, 2 Ves. Jr. 498.

⁵ 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n).

⁶ *More v. Freeman*, Bunb. R. 205.

So, if the husband should, after marriage, for good reasons, contract with his wife, that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in equity.¹ So, if husband and wife, for a *bonâ fide* and valuable consideration, should agree that he should purchase land and build a house thereon for her, and she should pay him therefor out of the proceeds of her own real estate; if he should perform the contract on his side, she also would be compelled to perform it on her side.² Nay, if an estate should be devised to a husband for the separate use of his wife, it would be considered as a trust for the wife, and he would be compelled to perform it.³ •

[* § 1372 *a*. But where a legacy to the wife was paid to her, and both she and her husband executed a release, and, immediately after, the money came into the hands of the husband and he employed it, partly in his own business, and partly in the family expenditure, with the assent of the wife, there being no other evidence whether the wife expected it to be held in trust for her use, it was considered there was no such trust, and that she could not claim it out of her husband's estate.⁴

§ 1372 *b*. But where a father placed trust funds in the hands of his son-in-law, for the benefit of his daughter, and the son-in-law purchased real estate with the fund, and took the title to himself; it was held the Court of Equity would protect the estate against the creditors of the husband; but not to the extent of improvements, which the husband had made with his own money, and for the purpose of protecting it from his creditors.⁵]

§ 1373. The wife may become a creditor of her husband, by acts and contracts during coverture; and her rights, as such, will be enforced against him and his representatives. Thus, for example, if a wife should unite with her husband to pledge her estate, or otherwise to raise a sum of money out of it to pay his debts, or to answer his necessities, whatever might be the mode

¹ *Harvey v. Harvey*, 1 P. Will. 125, 126; S. C. 2 Vern. R. 659, 760, and Mr. Raithby's note; Com. Dig. *Chancery*, 2 M. 11, 12, 14; *Bradish v. Gibbs*, 3 Johns. Ch. R. 523, 540.

² *Livingston v. Livingston*, 2 Johns. Ch. R. 537, 539. See also *Townshend v. Windham*, 2 Ves. 7.

³ *Darley v. Darley*, 3 Atk. 399; *Rich v. Cockell*, 9 Ves. 375; *Post*, § 1377 *a*, 1380.

⁴ [* *Gardner v. Gardner*, 5 Jur. N. S. 975.

⁵ *Lathrop v. Gilbert*, 2 Stockton, Ch. R. 344.]

adopted to carry that purpose into effect, the transaction would, in equity, be treated according to the true intent of the parties. She would be deemed a creditor or a surety for him, (if so originally understood between them,) for the sum so paid; and she would be entitled to reimbursement out of his estate, and to the like privileges as belong to other creditors.¹

§ 1374. In respect also to gifts or grants of property by a husband to his wife after marriage, they are, ordinarily, (but not universally,) void at law.² But courts of equity will uphold them in many cases where they would be held void at law; although, in other cases, the rule of law will be recognized and enforced. Thus, for example, if a husband should, by deed, grant all his estate or property to his wife, the deed would be held inoperative in equity, as it would be in law; for it could in no just sense be deemed a reasonable provision for her (which is all that courts of equity hold the wife entitled to); and in giving her the whole, he would surrender all his own interests.³

§ 1375. But, on the other hand, if the nature and circumstances of the gift or grant, whether it be express or implied, are such that there is no ground to suspect fraud, but it amounts only to a reasonable provision for the wife, it will, even though made after coverture, be sustained in equity.⁴ Thus, for example, gifts, made by the husband to the wife during the coverture, to purchase clothes, or personal ornaments, or for her separate expenditures, (commonly called pin-money,) and personal savings and profits made by her in her domestic management, which the husband allows her to apply to her own separate use,⁵ will be held to vest in her, as against her husband, (but not as against his creditors,) an unimpeachable right of property therein, so that they may be treated as her exclusive and separate estate.⁶ It is true that courts of equity

¹ *Tate v. Austin*, 1 P. Will. 264, and Mr. Cox's note; S. C. 2 Vern. 689, and Mr. Raithby's note; *Neimcewicz v. Gahn*, 3 Paige, R. 614; *Pawlet v. Delaval*, 2 Ves. 663, 669; *Clinton v. Hooper*, 3 Bro. Ch. R. 201; *Innes v. Jackson*, 16 Ves. 356, 367; S. C. 1 Bligh, R. 104, 114, 115 to 127; 1 Eq. Abridg. 62; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); 1 Roper on Husb. and Wife, ch. 4, § 1, p. 143 to 162.

² See *Martin v. Martin*, 1 Greenl. R. (Bennet's ed.) 394.

³ *Beard v. Beard*, 3 Atk. 72.

⁴ *Walter v. Hodge*, 2 Swanst. R. 106, 107; *Lucas v. Lucas*, 1 Atk. 270, 271.

⁵ *Slanning v. Style*, 3 P. Will. 337.

⁶ 2 Roper on Husb. and Wife, ch. 17, § 1, p. 132, 137 to 139; *Wilson v. Pack*, Prec. Ch. 295, 297; Sir Paul Neal's case, cited in Prec. Ch. 44; *Lucas v. Lucas*, 1 Atk. 270; *Walter v. Hodge*, 2 Swanst. 106, 107; *Graham v. Londonderry*, 3 Atk. 393 to 395.

will require clear and incontrovertible evidence to establish such gifts, as a matter of intention and fact; but when that is established, full effect will be given to them.¹ *A fortiori*, such allowances provided for by marriage articles, or by a settlement before marriage, even without the intervention of trustees, will be deemed valid in equity, to all intents and purposes, not only against the husband, but also against his creditors. And if such allowances are invested in jewels, or other ornaments, or property, the latter will be entitled to the same protection against the husband and his creditors.²

§ 1375 *a*. Pin-money is a very peculiar sort of gift for a particular purpose and object, and, whether it is secured by a settlement or otherwise, it is still required to be applied to those purposes and objects.³ It is not deemed to be an absolute gift, or, as it is sometimes said, out and out, by the husband to the wife. It is not considered like money set apart for the sole and separate use of the wife during coverture, excluding the *jus mariti*. But it is a sum set apart for a specific purpose, due or given to the wife, in virtue of a particular arrangement, payable and paid by the husband in virtue of that arrangement, and for that specific purpose. Pin-money is a sum paid in respect to the personal expense of the wife, for her dress and pocket-money; and hence, as the very name seems to import, it has a connection with her person, and is to deck and attire it. The husband, therefore, as well as the wife, may be said to have an interest in it; for the wife is to dress (it has been said) according to his rank, and not her own. It is upon this ground that courts of equity refuse to go back to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement; for the money is meant to dress the wife during the year, so as to keep up the dignity of the husband, and not for the accumulation of the fund. This provides a check and control to the husband. It prevents the wife from misspending the money. It secures the appropriation of the money to its natural and original purpose. It is with this view, quite as much as on account of the presumed satisfac-

¹ McLean *v.* Longlands, 5 Ves. 78, 79; Walter *v.* Hodge, 2 Swanst. R. 103 to 107.

² Ibid.; 2 Roper on Husb. and Wife, ch. 18, § 4, p. 165, 166; 1 Roper on Husb. and Wife, ch. 8, § 1, 2, p. 288 to 327; Offley *v.* Offley, Prec. Ch. 26, 27.

³ Jodrell *v.* Jodrell, 9 Beavan, R. 45.

tion by acquiescence, that courts of equity have established the principle above stated, not to allow the wife to claim pin-money beyond the year. On the same ground it is that the personal representatives of the wife are not allowed to make any claim for the arrears of pin-money, not even for arrears of a year; for the allowance has a sole regard to the personal dress and expenses of the wife herself during that period. And hence, also, it is, that if the wife becomes insane, and remains so until her death, if the husband has maintained her, and taken suitable care of her, according to her rank and condition, courts of equity will not allow her personal representatives to make any claim for any arrearages of pin-money, even secured by a marriage settlement.¹

¹ Howard v. Digby, 8 Bligh, R. 224, 246 to 250; Id. 252, 257, 261, 262, 266, 267, 269, 271. The whole of this section is abstracted from the elaborate and able opinion of the Lord Chancellor in this case. In one part of his opinion, the noble lord said: "It is wonderful, indeed, how little there is to be found upon the subject of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot even get a definition from the books, upon which you can rely; you cannot trace the line which divides it from the separate property of the wife with any distinctness, or in a way on which you can depend. And as to authority, either of decisions, *dicta*, or text-writers, or *obiter dicta* of judges, there is nothing that furnishes a clear and steady light on the subject, the cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way, that when a text-writer quotes a case, Brodie v. Barry (2 Ves. & B. 36), for instance, in support of a doctrine touching pin-money, you look at the book, and find it has nothing to do with pin-money, and does not support the proposition for which it is cited." Again, "It is a very material fact, in a case where authority is so little to be had, that the general opinion of all those who give pin-money, either to their own wives or to the wives of their sons, upon marriage, should be entirely coincident with the view, to which the argument had led, namely, that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in. I mean not the jeweller's account for the jewels, — because that is a very different question, — but I mean for the repair and the wear and tear of trinkets, and for pocket-money, and things of that sort; I do not, of course, mean the carriage, and the house, and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband, that a sum of money is settled at the marriage, which is to be set apart to the use of the wife, for the purpose of bearing those personal expenses." Again, "It is meant for the wife's expenditure on her person, — it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture, by the intercession and advice, and at the instance of her husband. I will not go so far as to say, because it is not necessary for the purpose of this argument, that he

§ 1376. Under the like consideration, in a great measure, falls the right of the wife to her paraphernalia; a term originally of Greek derivation, (where it means something reserved over and above dower, or a dotal portion,) and afterwards imported into the civil law, and from thence adopted into the language of the common law,¹ in which it includes all the personal apparel and ornaments of the wife, which she possesses, and which are suitable to her rank and condition in life.² At law, the husband in his lifetime may dispose of her paraphernalia, excepting, indeed, her necessary apparel; and they are liable to the claims of creditors, with the like exception.³ But the wife is, even at law, entitled to

might hold back her pin-money, if she did not attire herself in a becoming way. I should not be afraid, however, of stretching the proposition to that extent. But I am not bound here to do so, because, if, during her coverture, a claim were made by her, (and this is one distinction between the claim of the wife and the claim of her personal representatives after her death,) the absurd and incredible state of things that I have put, as the consequence of their argument, — the case of her attiring herself in an unbecoming manner, never could happen, if the pin-money is only to be claimed by herself; for, in that case, the duke would of course say, ‘If you do not dress as you ought to do, what occasion have you for pin-money?’ He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for its proper purpose. Now, the purpose is not the purpose of the wife alone; it is for the establishment; it is for the joint concern; it is for the maintenance of the common dignity; it is for the support of that family, whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendor of the joint establishment, consisting of husband and wife, that part of the whole expenditure is for the support of the wife herself. Then, does it not follow from thence, that the husband has a direct interest in the expenditure of the pin-money? He has a right to have the pleasure of it, to have the credit of it, to be spared the eye-sore of a wife appearing as misbecomes his station. That is the destination and the object of pin-money.” *Post*, § 1396, 1425, note. See *Jodrell v. Jodrell*, 9 Beavan, R. 45.

¹ Si res dentur in ea, quæ Græci *παράφερνα* dicunt, quæ Galli *peculium* appellant. Dig. Lib. 23, tit. 3, l. 9, § 3. As to these the Code declared: “Ut vir in his rebus, quas extra dotem mulier habet, quas Græci *παράφερνα* dicunt, nullam uxore prohibente habeat communionem, nec aliquam ei necessitatem imponat, &c. Nullo modo (ut dictum est) muliere prohibente, virum in paraphernis se volumus immiscere.” Cod. Lib. 5, tit. 14, l. 8; 1 Domat, B. 1, tit. 9, § 4, p. 180 to 182.

² 2 Black. Comm. 435.

³ 2 Black. Comm. 435, 436; *Graham v. Londonderry*, 3 Atk. 393; *Townshend v. Windham*, 2 Ves. 7; *Burton v. Pierpont*, 2 P. Will. 79; *Parker v. Harvey*, 4 Bro. Parl. R. 609, by Tomlins; S. C. 3 Bro. Parl. Cas. 187; *Howard v. Menifee*, 5 Pike (Arkansas), 668.

her paraphernalia against his representatives; for the husband cannot by will dispose of them, or leave them to his representatives.¹ Courts of equity fully recognize this right of the husband and his creditors; although, in case of the latter, if there are any other personal assets of the husband, they will, after his death, be marshalled against his representatives in favor of the widow.²

§ 1377. There is, however, a distinction upon this subject of paraphernalia, which is entitled to consideration. Where the husband, either before or after marriage, gives to his wife articles of paraphernal nature, they are not treated as absolute gifts to her, as her own separate property; for, if they were, she might dispose of them at any time, and he could not appropriate them to his own use. But they are deemed as, technically, paraphernalia, to be worn by the wife as ornaments of her person; and so to be deemed gifts *sub modo* only.³ But, if the like articles were bestowed upon her by a father, or by a relative, or even by a stranger, before or after marriage, they would be deemed absolute gifts to her separate use; and, then, if received with the consent of her husband, he could not, nor could his creditors, dispose of them any more than they could of any other property received and held to her separate use.⁴

§ 1377 a. And although (as we have seen⁵) postnuptial contracts for a settlement entered into by husband and wife, or husband and wife and children, will not, if they are purely voluntary, be enforced against the husband, or his heirs, or personal representatives; yet this doctrine is to be received with this qualification, that it is done in pursuance of a duty on the part of the

¹ Ibid.; *Tipping v. Tipping*, 1 P. Will. 729, 730; *Seymore v. Tresilian*, 3 Atk. 358, 359; *Ridout v. Earl of Plymouth*, 2 Atk. 105; *Northey v. Northey*, 2 Atk. 77; S. C. 9 Mod. R. 270.

² *Ante*, § 568; *Townshend v. Windham*, 2 Ves. 7; *Tipping v. Tipping*, 1 P. Will. 729; *Burton v. Pierpont*, 2 P. Will. 79, 80; *Tynt v. Tynt*, 2 P. Will. 542, 544, and Mr. Cox's note (1); *Probert v. Clifford*, Ambler, R. 6, and Mr. Blunt's note; *Inledon v. Northcote*, 3 Atk. 438; *Snelson v. Corbett*, 3 Atk. 369; *Aldrich v. Cooper*, 8 Ves. 397; *Boynton v. Parkhurst*, 1 Bro. Ch. R. 576; S. C. 1 Cox, 106; *Aguilar v. Aguilar*, 5 Madd. R. 414; 2 Roper on Husb. and Wife, ch. 17, § 3, p. 144, 145, and note.

³ *Graham v. Londonderry*, 3 Atk. R. 393 to 395; *Ridout v. Earl of Plymouth*, 2 Atk. 104.

⁴ *Graham v. Londonderry*, 3 Atk. 393 to 395; 2 Roper on Husb. and Wife, ch. 17, § 3, p. 143; *In re Grant*, 2 Story, 312.

⁵ *Ante*, § 95, 169, 433, 706 a, 789, 793, 973, 987, 1040 b.

husband, which a court of equity would enforce. For, if a husband should voluntarily enter into a contract to make a settlement, or should actually make a settlement upon his wife and children, in consideration of personal property coming by distribution or bequest to her from her relatives, to no greater extent than what a court of equity would, upon a suitable application, by a bill, direct him to make, in such a case, the postnuptial contract, or settlement, will not only be held valid and obligatory upon him and his representatives, but equally so against his creditors.¹

§ 1378. In the next place, as to the manner in which a married woman may acquire a separate estate, and as to her powers and interests therein. It is well known that the strict rules of the old common law would not permit the wife to take or enjoy any real or personal estate separate from or independent of her husband. And, although these rules have been in some degree relaxed and modified in modern times, yet they have still a very comprehensive influence and operation in courts of law.² On the other hand, courts of equity have, for a great length of time, admitted the doctrine, that a married woman is capable of taking real and personal estate to her own separate and exclusive use; and that she has also an incidental power to dispose of it.³

§ 1379. The power to hold real and personal property to her own separate and exclusive use, may be, and often is, reserved to her by marriage articles, or by an actual settlement made before marriage; and, in that case, the agreement becomes completely obligatory between the parties after marriage, and regulates their future rights, interests, and duties. In like manner, real and personal property may be secured for the separate and exclusive use of a married woman after marriage; and thus the arrangement may acquire a complete obligation between the parties.⁴

§ 1380. It was formerly supposed that the interposition of trustees was, in all arrangements of this sort, whether made before or after marriage, indispensable for the protection of the wife's rights

¹ *Wickes v. Clarke*, 8 Paige, R. 161; *Seward v. Jackson*, 8 Cowen, R. 406; *Ante*, § 372, 1372, 1373; *Post*, § 1415.

² See *Coomes v. Elling*, 3 Atk. 679; 2 *Roper on Husb. and Wife*, ch. 18, p. 151. See *Agar v. Blethyn*, 1 Tyrw. & Grang. 160.

³ 1 *Fonbl. Eq. B.* 1, ch. 2, § 6, note (n); 2 *Roper on Husb. and Wife*, ch. 18, p. 151 to 266.

⁴ *Ibid.*; *Ante*, § 372, *Post*, 1415; *Wickes v. Clarke*, 8 Paige, R. 161.

and interests. In other words, it was deemed absolutely necessary, that the property, of which the wife was to have the separate and exclusive use, should be vested in trustees for her benefit; and that the agreement of the husband should be made with such trustees, or, at least, with persons capable of contracting with him for her benefit.¹ But although, in strict propriety; that should always be done, and it usually is done in regular and well-considered settlements, yet it has for more than a century been established in courts of equity, that the intervention of trustees is not indispensable;² and that, whenever real or personal property is given or devised, or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also.³ In all such cases, the husband will be held a mere trustee for her;⁴ and, although the agreement is made between him and her alone, the trust will attach upon him, and be enforced in the same manner, and under the same circumstances, that it would be if he were a mere stranger.⁵ It will make no difference, whether the separate estate be derived from her husband himself, or from a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice.

§ 1381. Under what circumstances, property given, secured, or bequeathed to the wife, will be deemed a trust for her separate and exclusive use, is a matter which, upon the authorities, in-

¹ Ibid.; *Harvey v. Harvey*, 1 P. Will. 125; *Burton v. Pierpont*, 2 P. Will. 79; *Peacock v. Monk*, 2 Ves. 190.

² See *Firemen's Ins. Co. v. Bay*, 4 Barb. 407.

³ 2 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); 2 Roper on Husb. and Wife, ch. 18, p. 151 to 157; *Parker v. Brooke*, 9 Ves. 583; 2 Roper on Legacies, by White, ch. 21, § 5, p. 370; *Bennet v. Davis*, 2 P. Will. 316, decided in 1725; *Lucas v. Lucas*, 1 Atk. 270; *Pawlet v. Delaval*, 2 Ves. 666, 667; *Slanning v. Style*, 3 P. Will. 337 to 339; *Rollfe v. Budder*, Bunb. R. 187; *Darley v. Darley*, 3 Atk. 399; *Rich v. Cockell*, 9 Ves. 375; *Davison v. Atkinson*, 5 T. Rep. 434; *Bradish v. Gibbs*, 3 Johns. Ch. R. 540; *Shirley v. Shirley*, 9 Paige, 363; *Lee v. Prieaux*, 3 Bro. Ch. R. 383; *Woodmeston v. Walker*, 2 Russ. & Mylne, 197; *Major v. Lansley*, 2 Russ. & Mylne, 355.

⁴ See *Porter v. Bank of Rutland*, 19 Vermont, 410; *Blanchard v. Blood*, 2 Barbour, 352. [* See also *Ellis v. Woods*, 9 Rich. Eq. R. 19.]

⁵ 2 Fonbl. Eq. B. 1, ch. 2, § 6, note (n), &c.; *Ante*, § 1732.

volves some nice distinctions. There is no doubt that, when, from the terms of the gift, settlement or bequest, the property is expressly, or by just implication, designed to be for her separate and exclusive use, (for technical words are not necessary,) the intention will be fully acted upon; and the rights and interests of the wife sedulously protected in equity.¹ But the question which most frequently arises is, what words are sufficiently expressive of such a purpose;² for the purpose must clearly appear beyond any reasonable doubt; otherwise, the husband will retain his ordinary, legal, and marital rights over it.³

§ 1382. On the one hand, if the language of a marriage settlement, made before marriage, or of a gift or bequest to a married woman after marriage, be, that she is to have the property "to her sole use or disposal"; or, "to her separate use or disposal";⁴ or, "to her sole use and benefit";⁵ or, "for her own use, and at her own disposal";⁶ or, "to her own use during her life, independent of her husband";⁷ or, "that she shall enjoy and receive the issues and profits";⁸ or, that it is an allowance, as or for pin-money (*eo nomine*);⁹ in all these cases the marital rights of her husband will be excluded, and the property will be for her exclusive use. So, a bequest to a married woman, "her receipt to the executors to be a sufficient discharge to the executors," is equivalent to saying, to

¹ *Darley v. Darley*, 3 Atk. R. 399; *Tyrrell v. Hope*, 2 Atk. 561; *Stanton v. Hall*, 2 Russ. & Mylne, 175; *Newlands v. Paynter*, 10 Sim. R. 377; S. C. 4 Mylne & Craig, 408; *Post*, § 1384.

² [In *Stewart v. Kissam*, 2 Barbour, 493, it was said no particular form of words is necessary to create a trust for the separate use of a married woman; it is sufficient if there is a clear intent to give the property to the wife, for her own benefit, and to exclude the husband. And see *Taylor v. Stone*, 13 Smedes & Marshall, 653.]

³ *Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clark*, 3 Ves. 166; *Ex parte Ray*, 1 Madd. R. 199; *Rich v. Cockell*, 9 Ves. 370, 377; *Wills v. Sayers*, 4 Madd. R. 409; *Massey v. Parker*, 2 Mylne & K. 174.

⁴ *Ibid.*; *Adamson v. Armitage*, Cooper, Eq. R. 283; S. C. 19 Ves. 416; *Wills v. Sayers*, 4 Madd. R. 409; 2 Roper on Legacies, by White, ch. 21, § 5, p. 370, 371.

⁵ — *v. Lyne*, 1 Younge, R. 562.

⁶ *Prichard v. Ames*, 1 Turn. & Russell, 222; *Stanton v. Hall*, 2 Russ. & Mylne, 175.

⁷ *Wagstaff v. Smith*, 9 Ves. 520. See *Dixon v. Olmius*, 2 Cox, R. 414.

⁸ *Tyrrell v. Hope*, 2 Atk. 561.

⁹ *Herbert v. Herbert*, Prec. Ch. 44; *Milles v. Wikes*, 1 Eq. Abridg. 66; 2 Roper on Husb. & Wife, ch. 17, § 1, p. 132.

her sole and separate use.¹ So, money paid to the husband “for the livelihood of the wife”; and money given to a married woman for her own use, “independent of her husband”; and money or stock given to such married woman, “not to be disposed of by her husband, without her consent”; will be construed to give her the property to her sole and separate use.² So, a bequest to a married woman and her infant daughter, to be equally divided between them, share and share alike, “for their own use and benefit, independent of any other person,” will be construed to mean to their sole and separate use.³ So, a bequest to a married woman, “for her benefit, independent of the control of her husband,” will receive the like construction.⁴ In all these cases, the words manifest an unequivocal intent to exclude the power and marital rights of the husband.

§ 1382 *a*. But even her own power over her separate property may be qualified. Thus, where there was a bequest of money and leaseholds to a *feme sole*, “for her own absolute use, without liberty to sell or assign during her life”; it was held that she took the property absolutely, but without any power to dispose of it during her life, or, in other words, with a restriction against alienation during her life.⁵ And other qualifications may, as we shall presently see, be annexed to her power of disposal or enjoyment thereof.⁶

§ 1383. On the other hand, a gift or bequest, after marriage, to a married woman, “for her own use and benefit”;⁷ or, “to pay the same into her own proper hands, to and for her own use and benefit”;⁸ or to pay an annuity “into her proper hands, for her own proper use and benefit”;⁹ have been held not to amount to a

¹ *Lee v. Prieaux*, 3 Bro. Ch. R. 381; *Lumb v. Milnes*, 6 Ves. 517; *Tyler v. Lake*, 2 Russ. & Mylne, 183; — *v. Lyne*, 1 Younge, R. 562; *Stanton v. Hall*, 2 Russ. & Mylne, 180; *Blacklow v. Laws*, 2 Hare, R. 40, 49.

² *Darley v. Darley*, 3 Atk. 399; *Wagstaff v. Smith*, 9 Ves. 520, 524; *Johnes v. Lockhart*, 3 Bro. Ch. R. 383, note; *Tyler v. Lake*, 2 Russ. & Mylne, 183.

³ *Margetts v. Baringer*, 7 Sim. R. 482; *Simons v. Horwood*, 1 Keen, R. 7.

⁴ *Simons v. Horwood*, 1 Keen, R. 7.

⁵ *Baker v. Newton*, 2 Beavan, R. 112.

⁶ *Post*, § 1384.

⁷ *Kensington v. Dollond*, 2 Mylne & K. 184; *Wills v. Sayers*, 4 Madd. R. 409; *Roberts v. Spicer*, 5 Madd. R. 491; 2 *Roper on Legacies*, by White, ch. 21, § 5, p. 371, 372.

⁸ *Tyler v. Lake*, 2 Russ. & Mylne, 183.

⁹ *Blacklow v. Laws*, 2 Hare, R. 49.

sufficient expression of an intention to exclude the marital rights of the husband; for, although the money is to be paid into her own hands, or to her own use, yet there is nothing in that inconsistent with its being subject to his marital rights.¹ So, an annuity given in trust for a married woman for life, "to pay the same to her and her assigns," will not exclude the marital rights of the husband.²

§ 1384. A distinction was formerly [taken between the case of a gift or bequest to a married woman, and the case of a gift or bequest to an unmarried woman generally, and not in the contemplation of an immediate marriage, or as a provision for that event. For, it was said, that if a gift or bequest should be made to an unmarried woman, to be at her own disposal, or for her sole and separate use, or independent of her husband, the title would vest absolutely in her, as owner; and the property would not, upon her subsequent marriage, be held by her in any other manner than her other absolute property; but it would be subject to the marital rights of her husband.³ The distinction has, however, been

¹ This doctrine is maintained expressly in the authorities. But there are certainly antecedent dicta or opinions the other way. See *Lumb v. Milnes*, 5 Ves. 520; *Hartley v. Hurle*, 5 Ves. 545; *Adamson v. Armitage*, Cooper Eq. R. 283; S. C. 19 Ves. 516; *Ex parte Ray*, 1 Madd. R. 199. But these opinions seem to have proceeded, in a good measure, upon a misunderstanding of the case of *Johnes v. Lockhart*, now correctly reported in 3 Bro. Ch. R. 383, Mr. Belt's note, where the doctrine of the text is explicitly supported. The case of *Brown v. Clark* (3 Ves. 166) shows how nicely language is sometimes interpreted to sustain the marital rights of the husband.

² *Dakins v. Berisford*, 1 Ch. Cas. 194. See also *Lumb v. Milnes*, 5 Ves. 517; *Stanton v. Hall*, 2 Russ. & Mylne, 175.

³ *Massey v. Parker*, 2 Mylne & K. 174; *Kensington v. Dollond*, 2 Mylne & K. 184; *Brown v. Pocock*, 2 Mylne & K. 189; *Newton v. Reid*, 4 Sim. R. 141; *Woodmeston v. Walker*, 2 Russ. & Mylne, 197; *Benson v. Benson*, 6 Sim. R. 126; *Knight v. Knight*, 6 Sim. R. 121; *Jacobs v. Amyatt*, 1 Madd. R. 376, note; *Carter v. Taggart*, 9 Eng. Law & Eq. R. 167; *Stiffe v. Everitt*, 1 Mylne & Craig, 37. This question has been much discussed in English courts, and no small diversity of opinion has been expressed upon it by the learned judges in equity. The doctrine stated in the text is supported by the cases above cited. But the Vice-Chancellor (Sir Lancelot Shadwell), in *Davies v. Thorneycroft*, 6 Sim. R. 420, held, that there was no difference, whether the bequest or trust was for the separate use of a married woman or an unmarried woman; for in each case, it would be a trust for her separate use, and goods, as such, against a present or future husband. (See also *Maber v. Hobbs*, 2 Younge & Coll. 317.) The same doctrine was held by Sir John Leach, in *Anderson v. Anderson*, 2 Mylne & Keene, 427. In *Bradley v. Hughes*, 8 Sim. R. 149, the Vice-Chancellor admitted, that it was now settled

since qualified, if not entirely overruled, and the doctrine seems now well established, that property may be secured to an unmarried woman, or a married woman, with a clause against anticipation, and in such a case it will be good against the marital rights of any future husband.¹ And the same doctrine seems applicable to every case, where property is given to the separate use of a woman, whether married or unmarried at the time, without any such clause; for, in such a case, if no other agreement is made between the parties, the future husband upon his marriage, is deemed to adopt the property in the state in which he finds it, as her separate property, and he is bound, in equity, not to disturb it.²

§ 1385. Cases also may occur of a separate estate, and even of a separate liability of a wife, of a more enlarged nature. Thus, by the custom of London, [as also in some American States,] a married woman may carry on trade within the city, as a sole trader, and be liable as such.³ And the right to carry on trade, on her sole account, may, independently of any such custom, be established by an agreement between the husband and wife, before

that if property be given for the separate use of a woman, during a particular coverture, she may, after that coverture is gone, alienate it, even though it is intended for her separate use. In *Scarborough v. Borman*, decided in November, 1838, 17 Law Jour. p. 10 to 24, the Master of the Rolls (Lord Langdale) held, that a gift to the sole and separate use of an unmarried woman was good against an after-taken husband. In the very recent case of *Nedby v. Nedby*, before the Lord Chancellor (Lord Cottenham), in Janaury, 1839 (4 Mylne & Craig, 367), the point was directly made; but the Lord Chancellor refused to decide it on an interlocutory motion, at the same time admitting the authorities to be in conflict. In the subsequent cases of *Tullett v. Armstrong* and *Scarborough v. Borman*, 4 Mylne & Craig, 377 to 407, the subject was most elaborately discussed, and all the authorities were reviewed by Lord Cottenham, and he held, that a gift to the sole and separate use of a woman, married or unmarried, with a clause against anticipation, was good against an after-taken husband. And in *Newlands v. Paynter*, 4 Mylne & Craig, 408, he held it to be equally good against such husband, without any such clause against anticipation. (See the English Law Magazine, for May, 1842, p. 285 to 301.) See what is a proper clause against anticipation, *Barrymore v. Ellis*, 8 Simons, R. 1; *Brown v. Bamford*, before Sir L. Shadwell, Vice-Chanc. in May, 1842.

¹ *Tullett v. Armstrong*, 4 Mylne & Craig, R. 377, 390; *Scarborough v. Borman*, 4 Mylne & Craig, R. 379; *Beggott v. Meux*, 1 Phillips, Ch. R. 627.

² *Newlands v. Paynter*, 4 Mylne & Craig, R. 408, 417, 418. (See the English Law Magazine, for May, 1842, p. 285 to 301;) *Barrymore v. Ellis*, 8 Simons, R. 1 *Brown v. Bamford*, before Sir L. Shadwell, Vice-Chanc. in May, 1842; *Ashton v. McDougall*, 5 Beavan, R. 56.

³ 2 Roper on Husb. and Wife, ch. 16, p. 125.

or after marriage. When such an agreement is entered into before marriage, it stands upon a valuable consideration ; and, therefore, if there is the interposition of trustees, it will be maintained against the husband and his creditors, as well at law as in equity. In such a case, the trustees of the wife will be entitled to the property assigned, and to the increase and profits thereof, for her sole and separate use and benefit. The wife will, even at law, be considered as the mere agent of her trustees, and her possession as their possession. Even if no trustees are interposed, the property will, in the like case, be protected in equity against the claims of the husband and his creditors, and excepted out of the general rules, which govern in cases of husband and wife.¹

§ 1386. Where the agreement for a separate trade by the wife occurs after marriage, and it is founded upon a valuable consideration, the like protection will be given at law, if the property is vested in trustees ; and the property, and the income and profits thereof, will be held secure for the wife against the husband and his creditors.² *A fortiori*, the doctrine will be enforced in equity. But if it is a voluntary agreement, it will be good against the husband only, and not against his creditors.³ Care, however, must be taken in all these cases, that the negotiations are not carried on in the name of the wife, as by taking notes or other securities in her name ; for then they will, at law, be held to belong to the husband, although in equity it will be otherwise.⁴

§ 1387. We here perceive, that the law will give effect to such agreements, only when those forms have been observed which will vest the property in parties capable of enforcing the proper rights of the wife in legal tribunals ; as is the case where the property is vested in trustees for her sole use and benefit, in order to enable her to carry on trade. But courts of equity will go further ; and if there is any such agreement before marriage, resting in articles and without trustees, by which she is permitted to carry on business on her sole and separate account ; or if, without any such antenuptial agreement, the husband should permit her, after mar-

¹ 2 Roper on Husb. and Wife, ch. 18, § 4, p. 165, 186 ; Jarman v. Woolloton, 3 T. R. 618 ; Haselinton v. Gill, 3 T. R. 620, note.

² Ibid. ; and 1 Roper on Husb. and Wife, ch. 8, § 2, p. 303 to 331.

³ Ibid.

⁴ 2 Roper on Husb. and Wife, ch. 18, § 4, p. 169, 170 ; Barlow v. Bishop, 1 East, R. 432.

riage, to carry on business on her sole and separate account; all that she earns in trade will be deemed to be her separate property, and disposable by her as such, subject, however, to the claims of third persons properly affecting it.¹ In the former case, the earnings will, in equity, be supported for her separate use against her husband and his creditors; in the latter, against him only, unless the permission after marriage arises from a valuable consideration.² So, if a husband should desert his wife, and she should be enabled, by the aid of her friends, to carry on a separate trade, (as that of a milliner,) her earnings in such trade will be enforced in equity against the claims of her husband.³

§ 1388. It remains to say a few words on the subject of the wife's power to dispose of her separate property, and of its liability for her contracts and debts. Wherever a trust is created, or a power is reserved by a settlement, to enable the wife after marriage to dispose of her separate property, either real or personal, it may be executed by her in the very manner provided for, whether it be by deed or other writing, or by a will or appointment. And courts of equity will, in all cases, enforce against heirs, devisees, and trustees, as well as against the husband and his representatives, the rights of the donee or appointee of the wife.⁴ But, where no such settlement, trust, or power is created before

¹ 2 Roper on Husb. and Wife, ch. 18, § 4, p. 171 to 176.

² 2 Roper on Husb. and Wife, ch. 17, § 4, p. 171, 172; *Gore v. Knight*, 2 Vern. 535; Sir Paul Neal's case, cited in *Herbert v. Herbert*, Prec. Ch. 44; *Slanning v. Style*, 3 P. Will. 337; 1 Fonbl. B. 1, ch. 2, § 6, note (m).

³ *Cecil v. Juxon*, 1 Atk. 278; *Lamphir v. Creed*, 8 Ves. 599; S. C. better reported in 2 Roper on Husb. and Wife, ch. 18, § 4, p. 173; Com. Dig. *Chancery*, 2 M. 11. Where the wife carries on trade under an agreement made before marriage, and the property is vested in trustees, the husband would not be liable to the payment of the debts relative to such trade, even at law. But if no trustees intervene, and the agreement was after marriage, then the husband would be liable for the debts at law. At least, he would be liable, unless a credit was exclusively given to the wife in relation to the trade, or the trade had been carried on without his sanction or permission. If, however, he should be liable at law, a court of equity would relieve him, at least, to the extent of making the funds in the trade applicable to the payment of the debts. See 2 Roper on Husb. and Wife, ch. 18, § 4, p. 174, 175.

⁴ 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (q); *Peacock v. Monk*, 2 Ves. 191; *Doe v. Staples*, 2 Term Rep. 695; *Wright v. Englefield*, Amb. R. 468; S. C. 2 Eden, R. 239; *Oke v. Heath*, 1 Ves. 135; *Marlborough v. Godolphin*, 2 Ves. 75; *Southby v. Stonehouse*, 2 Ves. 610, 612; *Pybus v. Smith*, 3 Bro. Ch. R. 339; *Dowell v. Dew*, 1 Younge & Coll. New R. 345.

marriage, but it rests in a mere agreement between the husband and wife, it was formerly a matter of doubt, whether the wife could dispose of her separate real estate, so as effectually to bind it; although it was admitted that she had a full power to dispose of her personal estate.

§ 1389. The distinction, and the reasons for it, are very clearly stated by Lord Hardwicke. "Agreements" (said he) "for settling estates to the separate use of the wife on marriage, are very frequent, relating both to real and personal estate. As to personal; undoubtedly, where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use, either the whole or particular parts, she may dispose of it by an act in her life or will. She may do it by either, though nothing is said of the manner of disposing of it. But there is a much stronger ground in that case, than there can be in the case of real estate; because that is to take effect during the life of the husband; for, if the husband survives, he is entitled to the whole; and none can come into a share with the husband on the statute of distributions. Then, such an agreement binds and bars the husband, and consequently bars everybody. But it is very different as to real estate; for her real estate will descend to her heir at law, and that more or less beneficially; for the husband may be tenant by the courtesy, if they have issue, otherwise not. But still it descends to her heir at law. Undoubtedly, on her marriage, a woman may take such a method that she may dispose of that real estate from going to her heir at law; that is, she may do it without a fine. But I doubt whether it can be done but by way of trust or of power over an use."¹

§ 1390. But this doubt, however powerfully urged upon technical principles, has been overcome; and the doctrine is now firmly established by the highest authority, that, in such a case, courts of equity will compel the heir of the wife to make a conveyance to the party in whose favor she has made a disposition of the real estate; in other words, he will be treated as a trustee of the donee, or appointee of the wife.² So, that it may now be laid

¹ *Peacock v. Monk*, 2 Ves. 191.

² *Wright v. Cadogan*, 6 Bro. Parl. Cas. 156; *S. C. Ambler*, R. 468; 2 Eden, R. 239; *Doe v. Staple*, 2 Term Rep. 695; *Cannel v. Buckle*, 2 P. Will. 243; *Rippon v. Dawding*, Ambler, R. 565, and Mr. Blunt's note; 2 Fonbl. Eq. B. 2, ch. 2, § 6, note (q); *Bradish v. Gibbs*, 3 Johns. Ch. R. 539, 540, 551.

down as a general rule, that all antenuptial agreements for securing to a wife separate property, will, unless the contrary is stipulated or implied, give her in equity the full power of disposing of the same, whether real or personal, by any suitable act or instrument in her lifetime, or by her last will, in the same manner, and to the same extent, as if she were a *feme sole*.¹ And in all cases where a power for this purpose is reserved to her by means of a trust, which is created for the purpose, she may execute the power without joining her trustees, unless it is made necessary by the instrument of trust.²

§ 1391. In regard to the power of the wife to dispose of her separate property, where no trust is interposed, but it rests merely upon a postnuptial agreement of the husband, there is a material distinction, whether it be personal estate, or whether it be real estate. In the former case, her power to dispose of it can affect her

¹ Ibid.; 2 Roper on Husb. and Wife, ch. 19, § 1, p. 177 to 198; 2 Fonbl. Eq. B. 1, ch. 2, § 6, note (g); Hulme v. Tenant, 1 Bro. Ch. R. 20; Wagstaff v. Smith, 9 Ves. 520; Parkes v. White, 11 Ves. 220; Grigby v. Cox, 1 Ves. 517; Cotter v. Layer, 2 P. Will. 623; Bradish v. Gibbs, 3 Johns. Ch. R. 540 to 551.

² 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (g); Grigby v. Cox, 1 Ves. 517; Essex v. Atkins, 14 Ves. 547; Jacques v. Methodist Episcopal Church, 17 Johns. R. 548; S. C. 3 Johns. Ch. R. 86 to 114; 2 Roper on Husband and Wife, ch. 20, § 2, p. 215. This doctrine is necessary to be limited to cases, where there is no restraint upon the wife, by the instrument giving her the separate property, as to her power of disposing of it. What terms in the instrument will create either an express or virtual restraint upon her power of disposing of such separate property has been a matter often discussed; and upon the authorities, there is some nicety of construction. See on this subject Wagstaff v. Smith, 9 Ves. 520; Parkes v. White, 11 Ves. 220; Fettiplace v. Gorges, 3 Bro. Ch. R. 8; S. C. 1 Ves. Jr. 46; Glyn v. Baster, 1 Younge & Jerv. 329; Acton v. White, 1 Sim. & Stu. 429; Lee v. Muggeridge, 1 Ves. & B. 118; Sturgis v. Corp, 13 Ves. 190; Mores v. Huish, 5 Ves. 692; Sockett v. Wray, 4 Bro. Ch. R. 483; Sugden on Powers, ch. 2, § 1, p. 113 to 119 (3d edit.). See also the case of The Methodist Episcopal Church v. Jacques, 3 Johns. Ch. R. 86 to 114, where the authorities are elaborately examined by Mr. Chancellor Kent; and the same case on appeal, 17 Johns. R. 548. See also 2 Roper on Husb. and Wife, ch. 19, § 1, 2, p. 177, 181; Ibid. ch. 20, § 1, p. 199 to 206; Ibid. ch. 21, § 1, p. 229 to 235. When a married woman has an absolute power to dispose of property, she may execute it in any manner capable of transferring it. When she has a power only over it, she must dispose of it in the manner prescribed by the power. And this distinction is very important; for, in many cases, courts of equity will not interpose to aid the defective execution of powers in favor of volunteers, whatever it may do in favor of purchasers. See *Ante*, § 169 to 178; 2 Roper on Husb. and Wife, ch. 20, § 1, 2, p. 199 to 220.

husband's right only ; and, therefore, his assent is conclusive upon him.¹ But it is very different in respect to her real estate ; for, here her own heirs are, or may be, deeply affected in their interests by descent. Now, by the general principles of law, a married woman is, during her coverture, disabled from entering into any contract respecting her real property, either to bind herself, or to bind her heirs. And this disability can be overcome only by adopting the precise means allowed by law to dispose of her real estate ; as in England by a fine, and in America by a solemn conveyance.² It is true that the husband, by his own postnuptial agreement with his wife, may bind his own interest in her real estate, and convert himself into a trustee for her. But he cannot trench upon the rights of her heir, who is no party to such an agreement. And, under such circumstances, the latter will take her real estate by descent, unaffected by any of the trusts springing from the agreement.³

§ 1392. The remarks which have been made apply to the case of the real estate of the wife, already vested in her, as affected by her own antenuptial or postnuptial agreement with her husband. But the question may arise, as to her rights and power over real estate, which is given by a third person to her, during her coverture, for her separate use, with a power to dispose of the same, where no trustees are interposed to protect the exercise of the power.⁴ As to this, the received doctrine seems to be, that, if an estate is, during coverture, given to a married woman, and her heirs for her separate use, without more, she cannot in equity dispose of the fee from her heirs ; but she must dispose of it, if at all, in the manner prescribed by law ; as by a fine.⁵ But, if in

¹ *Wright v. Englefield*, Ambler, R. 468 ; *Dillon v. Grace*, 2 Sch. & Lefr. 463 ; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (q) ; *Peacock v. Monk*, 2 Ves. 191 ; *Major v. Lansley*, 2 Russ. & Mylne, 355.

² *Dillon v. Grace*, 2 Sch. & Lefr. 456, 462 to 464 ; *Wright v. Cadogan*, 2 Eden, R. 257 to 259.

³ *Ibid.* ; 2 Roper on Husband and Wife, ch. 19, § 1, p. 179 to 181.

⁴ There is no doubt, that a gift of personal estate, or of the rents and profits of real estate, to a married woman, for her separate use, during her life, would give her a complete power to dispose of the same. See 2 Roper on Husband and Wife, ch. 19, § 2, p. 182 ; *Hulme v. Tenant*, 1 Bro. Ch. R. 16, 19 to 21 ; *Fettiplace v. Gorges*, 1 Ves. Jr. 46 ; S. C. 3 Bro. Ch. R. 7, and Mr. Belt's note ; *Peacock v. Monk*, 2 Ves. 191 ; *Roach v. Haynes*, 8 Ves. 589 ; *Parkes v. White*, 11 Ves. 220, 221 ; *Rich v. Cockell*, 9 Ves. 369, 375 ; *Wagstaff v. Smith*, 9 Ves. 520 ; *Brandon v. Robinson*, 18 Ves. 435, 436 ; *Ante*, § 1391.

⁵ 2 Roper on Husband and Wife, ch. 19, § 2, p. 182.

such a case, a clause is expressly superadded, that she shall have power to dispose of the estate, so given to her, during her coverture, there, courts of equity will treat such a power, as enabling her effectually to dispose of the estate, notwithstanding no trustees are interposed.¹ The reason of the distinction is, that the terms, "for her separate use," are not supposed to indicate any intention to give her more than the sole use and power of disposal of the profits of the real estate during the life of her husband; and more expressive words are indispensable to demonstrate the more enlarged intention of conferring an absolute power to dispose of the whole fee. Unless such an absolute power to dispose of the whole fee is conferred on the wife, she takes the estate in fee, subject to the ordinary disabilities resulting from her coverture. As her separate estate, her husband cannot intermeddle with it; but her heir will take it by descent, as he would any other property, vested in her in fee.²

§ 1393. As to personal property, and the income of real property, we have already seen, that, if they are given for the separate use of a married woman, she has, in equity, a full power to dispose of them at her pleasure.³ But qualifications may be attached to the gift, which will control this absolute power; and, on the other hand, this absolute power may exist, notwithstanding words accompany the gift, which may seem, *primâ facie*, intended to confer the power *sub modo*, only. Thus, for example, if there be an express limitation to a married woman *for life* with a power to dispose of the same property by will; there, her interest will be deemed a partial interest, and equivalent to a life-estate only; and she cannot dispose of the property absolutely, except in the manner prescribed by the power.⁴

§ 1394. On the other hand, if the property is expressly given to a married woman, "to her for her sole and separate use," without saying, *for life*; and she is further authorized to dispose of the same by will; in such a case, the gift will be construed to confer

¹ See 2 Roper on Husb. and Wife, ch. 16, § 2, p. 102 to 104; Ibid. ch. 19, § 2, p. 181; Maundrell v. Maundrell, 10 Ves. 254, 255; Clancy on Married Women, ch. 5, p. 282, 287; Peacock v. Monk, 2 Ves. 190; Downes v. Timperon, 4 Russ. R. 334.

² 2 Roper on Husb. and Wife, ch. 19, § 2, p. 182.

³ *Ante*, § 1389, 1390, note; Major v. Lansley, 2 Russ. & Mylne, 355.

⁴ Reid v. Shergold, 10 Ves. 370, 379; 2 Roper on Husband and Wife, ch. 20, § 1, 2, p. 200 to 211. See Calhoun v. Calhoun, 2 Strobb. Eq. 231.

on her the absolute property, and, consequently she may dispose of it otherwise than by will ; for, the absolute property being given, the power becomes nugatory, and is construed to be nothing more than an anxious expression of the donor, that she may have an uncontrolled power of disposing of the property.¹ So, if a limitation be to a married woman for life, for her sole and separate use, with a particular power of appointment of the property, and in default of any appointment the property is limited to her personal representatives, she will, or at least may, under such circumstances, be deemed the absolute owner ; and, as such, she will have

¹ *Elton v. Shepard*, 1 Bro. Ch. R. 532, and Mr. Belt's note ; 2 Roper on Husb. and Wife, ch. 20, § 1, p. 200, 201 ; *Barford v. Street*, 16 Ves. 135 ; *Irwin v. Farrer*, 19 Ves. 86 ; *Ante*, § 974 a. Some very nice distinctions exist in the cases on this subject. Thus, in *Bradlee v. Westcott*, 13 Ves. 445, 451, where A. bequeathed to his wife B. all his personal estate for life, to be at her absolute disposal during that period ; and after her death he gave such of his wife's jewels, &c., household furniture, and plate, which she should be possessed of at the time of her death, together with £ 500, to such persons as she should appoint by her will ; and in default of such appointment, the same to fall into the residuum of his personal estate, which he afterwards bequeathed to other persons ; Sir William Grant held, that the wife took an estate for life only in the whole, with a power of appointment. On that occasion he said : " The distinction is perhaps slight, which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established, that, in the latter case, the property vests. A gift to A., and to such persons as he shall appoint, is absolute property in A. without any appointment. But if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to anything." In *Barford v. Street* (16 Ves. 135), where there was a gift for life to A., with a power of appointment by deed, or writing, or will, and some special limitations, it was held, that A. had an estate for life, with an unqualified power of appointing the inheritance ; and that comprehended everything. So that A. was held to be entitled, as absolute owner. The case of *Irwin v. Farrer*, 19 Ves. 86, is still stronger. See also the case of *Smith v. Bell*, 6 Peters, R. 68 ; *Acton v. White*, 1 Sim. & Stu. 429 ; *Randall v. Russell*, 3 Meriv. R. 190 ; *Phillips v. Chamberlain*, 4 Ves. 53, 54, 58 ; *Hales v. Margerum*, 3 Ves. 299 ; *Hentley v. Thomas*, 15 Ves. 597 ; S. C. 2 Roper on Husb. and Wife, ch. 20, § 1, p. 204, and note ; *Langham v. Nenny*, 3 Ves. 469, 470 ; *Lee v. Muggeridge*, 1 Ves. & B. 118, 123 ; *Pybus v. Smith*, 1 Ves. Jr. 189 ; *Witts v. Dawkins*, 12 Ves. 501 ; *Browne v. Like*, 14 Ves. 302 ; 2 Roper on Husb. and Wife, ch. 20, § 1, 2, p. 199 ; *Socket v. Wray*, 4 Bro. Ch. R. 483, and Mr. Belt's note ; *Ante*, § 1073. Mr. Chancellor Kent has critically reviewed the authorities in his learned opinion in the case of *The Methodist Episcopal Church v. Jacques*, 3 Johns. Ch. R. 86 to 114.

an unqualified power to dispose of the property generally, without any exercise of the power of appointment.¹

¹ See 2 Roper on Husb. and Wife, ch. 20, § 1, p. 200, note (a); Ibid. p. 211 to 213; *Anderson v. Dawson*, 15 Ves. 532, 536; *Richards v. Chambers*, 10 Ves. 584; *Sanders v. Franks*, 2 Madd. R. 147, 155; *Clancy on Marr. Women*, ch. 6, p. 294 to 308; *Ante*, § 974 a. See also *Proudley v. Fielder*, 2 Mylne & Keene, 57; *Barrymore v. Ellis*, 8 Sim. R. 1; *Owens v. Dickenson*, 1 Craig & Phillips, 45. — The doctrine stated in the text, that, where there is a bequest to a married woman for life, for her sole and separate use, with a power of appointment, and in default of such appointment, to her personal representatives, she may, under such circumstances, take the absolute interest, is fully supported by the language of Sir William Grant, in *Anderson v. Dawson* (15 Ves. 533, 536), and is distinguished by him from the case, where, in default of the appointment, the property is to go "to her next of kin." "There is," said he, "a great difference between a limitation to the executors and administrators, and a limitation to the next of kin. The former is, as to personal property, the same as a limitation to the right heirs, as to real estate. But a limitation to the next of kin is like a limitation to heirs of a particular description; which would not give the ancestor, having a particular estate, the whole property in the land." Mr. Roper (2 Roper on Husb. and Wife, ch. 20, § 2, p. 211 to 213), however, thinks the doctrine ill-founded. His remarks are as follows: "The reader's attention is requested to the circumstance, that, in the cases before stated upon the present subject, with the exception of *Sockett v. Wray*, the ultimate limitation of the property, in default of the wife's appointment, was not to herself, but to a stranger, or to her next of kin. Because it has been intimated in some of those cases, that, although an express estate be given to the wife's separate use for life, with a power to dispose of the principal; yet, if, in default of appointment, such principal be limited to her executors or administrators, and not to her next of kin, the absolute interest in the fund will vest in her, and be disposable with her husband's concurrence, without resort to the particular power given her for the purpose. The principle of the distinction is this: that, in the first case, the wife is to be considered complete mistress or owner of the property, the effect of such limitation being compared to that of a limitation to her right heirs, which, in the instance of real estates, vests the absolute inheritance. But that, in the second case, the limitation to the wife's next of kin, being the same in effect as that to particular heirs, which, if the subject were lands, would not pass the fee to a donee or devisee, will not, therefore, vest the absolute interest in personal estate in the wife; and, consequently, that, in order to dispose of the capital, the wife must have resort to her special power. It is, however, submitted, that this analogy between real and personal estates is not applicable to the subject now under consideration. But that, when the limitation, in default of appointment, is to the wife's executors or administrators, it will be required that she should execute her power, in order to dispose of the fund during her marriage. The reasons are these: Admitting the limitation to impart to the wife the absolute interest in the fund; yet she being a married woman, the effect of such a limitation to her is quite different from a similar one to a man or to a single woman. For in the instance of such a limitation to a married woman, who is under a legal incapacity to dispose of property during

§ 1395. A married woman having this general power of disposing of her separate property, the question naturally arises, whether she may bestow it by appointment, or otherwise, upon her husband; or whether the legal disability attaches to such a transaction. Upon this subject the doctrine is now firmly established in equity, that she may bestow her separate property by appointment, or otherwise, upon her husband, as well as upon a stranger.¹ But at the same time, courts of equity examine every such transaction between husband and wife with an anxious watchfulness, and caution, and dread of undue influence; and if they are required to give sanction or effect to it, they will examine the wife in court, and adopt other precautions to ascertain her unbiased will and wishes.²

coverture, there is no repugnancy nor inconsistency between a limitation to her of the absolute interest, and a particular power of disposition over it during the marriage: as appears in a former part of this work relating to powers, and also under the title *Courtesy*, where it is shown, that an equitable interest for the wife's separate use for life in real estate, and the ultimate limitation to her of the fee-simple, do not unite in such a manner as to merge the particular estate and extinguish the special limitation to her separate use for life. The analogy, therefore, mentioned in the commencement of these observations, is inapplicable to limitations to married women; and it does not authorize the conclusion, that, when the wife has an estate to her separate use for life in personal property, with a power of appointment, and the absolute interest is limited to her, if she do not execute the power, she has, in analogy to similar limitations of real estates at law, such an absolute estate, as of necessity enables her to dispose of the property without regard to her special authority to do so. This necessity, therefore, not existing, and when the settler's intention in giving such a power is considered, as also the anxiety of a court of equity to protect the wife's property against improvident dispositions of it, from restraint, &c., during the marriage, it seems but reasonable, that, when an express estate for life in personalty is limited to her for her separate use, with a power of appointment, and in default of its execution to her, her executors or administrators, the same appointment should be considered necessary, as has been decided to be so when the ultimate limitation, in default of appointment, is to her next of kin." There are also some nice distinctions in *Richards v. Chambers*, 10 Ves. 584; *Ellis v. Atkinson*, 3 Bro. Ch. R. 565, and Mr. Belt's note, which, unless they proceed upon the peculiar ground, that there was a contingent interest by survivorship in the wife, would seem to favor Mr. Roper's opinion. See also *Field v. Sowle*, 4 Russ. R. 112; *Clancy on Married Women*, ch. 6, p. 294 to 308.

¹ See *Meriam v. Harsen*, 4 Edw. Ch. R. 70; *Cruger v. Douglas*, Id. 433; *Cruger v. Cruger*, 5 Barbour, 225.

² 2 Roper on Husband and Wife, ch. 20, § 2, p. 216, 217, 222 to 224; *Pybus v. Smith*, 1 Ves. Jr. 189, 194; *Parkes v. White*, 11 Ves. 209, 222, &c.; and *Methodist Episcopal Church v. Jacques*, 3 Johns. Ch. R. 86 to 114; *Bradish v. Gibbs*,

§ 1396. Courts of equity will not only sanction such a disposition of the wife's separate property in favor of her husband, when already made, but they will also, in proper cases, upon her application and consent, given in court, decree such property to be passed to her husband, whether it be in possession or reversion, in such a manner as she shall prescribe.¹ In the same way, her separate estate may be charged with and made liable for his debts.² But courts of equity have no authority, even with the consent of the wife, to transfer to the husband any property, secured to her sole and separate use for life, where no power of disposition is reserved to her over the property, or beyond the power reserved to her.³ And, therefore, if the husband should receive such property, he will ordinarily be compelled to account therefor. The same rule will apply, where the husband has by a settlement contracted to allow a specific annual sum (not money) for her sole and separate use, as, for example, £ 100 or £ 1,000 a year; for, in such cases, if he does not pay it, he will be held liable for the arrears.⁴ Where, indeed, the husband, with the consent of his wife, is in the habit of receiving the income, profits, and dividends of her separate estate, courts of equity regard the transaction as showing her voluntary choice, thus to dispose of it for the use and benefit of the family; and they will not, ordinarily, require him to account therefor, beyond the income, profits, and dividends received during the then last year,⁵ any more than they

3 Johns. Ch. R. 523, where the authorities are elaborately examined. See also *Milnes v. Busk*, 2 Ves. Jr. 498, 500; *Pickard v. Roberts*, 3 Madd. R. 386; *Essex v. Atkins*, 14 Ves. 542.

¹ See 2 Roper on Husband and Wife, ch. 20, § 2, p. 224 to 226; *Pickard v. Roberts*, 3 Madd. R. 386; *Sturgis v. Corp*, 13 Ves. 190; *Headen v. Rosher*, 1 McClel. & Younge, 89; *Allen v. Papworth*, 1 Ves. 163; S. C. Belt's Supplement, 88; *Sperling v. Rochfort*, 8 Ves. 164, 175; *Clark v. Pistor*, cited 3 Bro. Ch. R. 346, note; *Id.* 567; *Chesslyn v. Smith*, 8 Ves. 183.

² *Demarest v. Wynkoop*, 3 Johns. Ch. R. 144; *Field v. Sowle*, 4 Russ. R. 112.

³ *Richards v. Chambers*, 10 Ves. 580. There is a distinction between reversionary property, given for the separate use of the wife, and reversionary property which is given for her use generally. The former she may dispose of to her husband, but not the latter. *Post*, § 1413. See *Sturgis v. Corp*, 13 Ves. 190, and *Pickard v. Roberts*, 3 Madd. R. 386; 1 Roper on Husband and Wife, ch. 6, § 2, p. 246 to 248; 2 Roper on Husband and Wife, ch. 19, § 2, p. 184.

⁴ *Howard v. Digby*, 8 Bligh, R. 224, 257, 258.

⁵ *Square v. Dean*, 4 Bro. Co. R. 326; *Powell v. Hankley*, 2 P. Will. 82, 83; *Thomas v. Bennett*, 2 P. Will. 341; *Fowler v. Fowler*, 3 P. Will. 353; *Smith v. Camelford*, 2 Ves. Jr. 698; *Brodie v. Barry*, 2 Ves. & B. 36; 1 Fonbl. Eq. B. 1,

will to account for arrears of the wife's pin-money beyond the year.¹ But a distinction would probably be taken between the year's arrears of pin-money, and the year's arrears of the wife's other separate personal estate, so that her personal representatives might claim the latter, but not the former.²

§ 1397. In the next place, let us examine how far the separate property of the married woman is liable for any contracts, debts, or other charges created by her during her coverture. At law she is, during her coverture, generally incapable of entering into any valid contract to bind either her person or her estate.³ In equity, also, it is now clearly established that she cannot by contract bind her person or her property generally. The only remedy allowed will be against her separate property.⁴ The reason

ch. 2, § 6, note (n); *Parkes v. White*, 11 Ves. 225; *Townsend v. Windham*, 2 Ves. 7; *Milnes v. Busk*, 2 Ves. Jr. 488; 2 Roper on Husband and Wife, ch. 20, § 2, p. 220 to 222; *Methodist Episcopal Church v. Jacques*, 3 Johns. Ch. R. 90 to 92; *Howard v. Digby*, 8 Bligh, R. (N. S.) 224; S. C. 4 Sim. R. 588; 5 Sim. R. 330; *Post*, § 1495, note (1).

¹ *Howard v. Digby*, 8 Bligh, R. (N. S.) 224; reversing the decision of the Vice-Chancellor (Sir L. Shadwell) in the same case, 4 Sim. R. 588; S. C. 5 Sim. R. 330; *Post*, § 1495, note (1); *Ante*, § 1375 a.

² *Howard v. Digby*, 8 Bligh, R. (N. S.) 224, 257, 258.

³ *Marshall v. Rutton*, 8 Term Rep. 545; 2 Roper on Husband and Wife, ch. 21, § 2, p. 235, 236.

⁴ See Mr. Belt's note (3) to *Hulme v. Tenant*, 1 Bro. Ch. R. 20; *Sockett v. Wray*, 4 Bro. Ch. R. 485; *Nantes v. Corrock*, 9 Ves. 189; *Jones v. Harris*, 9 Ves. 496, 497; *Stuart v. Lord Kirkwall*, 3 Madd. 387; *Gardner v. Gardner*, 22 Wend. R. 526; *Owens v. Dickenson*, 1 Craig & Phillips, 48; *Francis v. Wigzell*, 1 Madd. R. 258. In this last case, the principal authorities are collected and commented on by Sir Thomas Plumer, and the doctrine in the text maintained. In *Aylett v. Ashton*, 1 Mylne & Craig, 105, 111, the Master of the Rolls (now Lord Cottenham) said: "The doctrine, as to how far the court will execute a contract entered into by a *feme covert*, as to her separate estate, was very fully discussed, and all the cases were cited, by Sir Thomas Plumer, in the case of *Francis v. Wigzell* (1 Madd. 258). It was there decided, and clearly in conformity with all previous decisions, that the court has no power against a *feme covert*, *in personam*, but that, if she has separate property, the court has control over that separate property. In all cases, however, the court must proceed *in rem* against the property. A *feme covert* is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before. A personal contract would be within the incapacity under which a *feme covert* labors. Sir T. Plumer says: 'There is no case in which this court has made a personal decree against a *feme covert*. She may pledge her separate property and make it answerable for her engagements; but, where her trustees are not made

of this distinction between her separate property and her other property is that, as to the former, she is treated as a *feme sole*, having the general power of disposing of it; but, as to the latter, all the legal disabilities of a *feme covert* attach upon her.¹

parties to a bill, and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained.' Sir T. Plumer there refers to *Hulne v. Tenant* (1 Bro. C. C. 16), before Lord Thurlow, and to *Nantes v. Corrock* (9 Ves. 182), where Lord Eldon, following the case before Lord Thurlow, lays down the rule in precisely the same terms. The present bill does not seek to affect the separate property, except through Mrs. Ashton, personally. If it had sought to affect the property, upon the ground that the contract had given the plaintiff a right against the property, the suit would have been brought against the trustees; for there must be some trustees of that part of the property which is settled to Mrs. Ashton's separate use, although their names do not appear. Although a *feme covert* has power, and the court has jurisdiction, over the rents and profits of her separate property, no case has given effect to her contracts against the corpus of her separate estate." See also *Milnes v. Busk*, 2 Ves. Jr. 498, 499, where Lord Rosslyn comments upon the then prevailing doctrines at law, and doubts them. [* See *Shattock v. Shattock*, 12 Jur. N. S. 405; *Johnson v. Gallagher*, 7 Jur. N. S. 273.]

¹ See *Stuart v. Lord Kirkwall*, 3 Madd. 387; *Gardner v. Gardner*, 22 Wend. R. 526; *Owens v. Dickenson*, 1 Craig and Phillips, 48. In this last case, Lord Cottenham said: "This married woman, as it appears by the settlement, had a separate estate, subject to her appointment by will or deed, or other instrument in writing, attested by one witness. Having, by her mark, put her signature to the document, which recognized the £ 210 as a debt which, in certain circumstances, she was to be liable to pay to the plaintiff, she makes her will, and by her will charges all her debts upon property which she had power to dispose of. Now, that document alone, within the authority of cases which have been decided, would have been operative upon her separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power; nor, indeed, in many of the cases, has there been any power existing at all. Besides, as it was argued in the case of *Murray v. Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*, whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say, that a contract to pay, is to be construed into a contract

[*§ 1397 *a*. In a very late case,¹ it was held that where a gift is made to A., a widow, for life, for her separate use, with remainder over, followed by a gift to A. for her own sole use and benefit absolutely, and A. subsequently married again, that the marital rights of the husband in the residue were excluded, and the case is distinguished from the case of *Gilbert v. Leevy*,² where Lord Westbury held a somewhat different opinion.]

§ 1398. The doctrines maintained by courts of equity, as to the nature and extent of the liability of the separate estate of a married woman for her debts and other charges created during her coverture, are somewhat artificial in their texture, and, therefore, require to be carefully distinguished from each other, as they cannot all be resolved into the general proposition, that she is, as to such property, to be deemed a *feme sole*. In the first place, her separate property is not in equity liable for the payment of her general debts, or of her general personal engagements.³ So far,

to pay out of a particular property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows, that, if she has a power to deal with it, she has the other power incident to property in general; namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied. Now these considerations are important, because it was part of the argument, that a married woman, although she can enter into a species of contract, and bind herself by a promissory note (for that was the case put), yet that she cannot be considered as having creditors; and, therefore, when she makes her will, and directs that her debts are to be paid, that part of the will cannot be carried into effect. But all the cases suppose she can have creditors. The holder of her promissory note has her contract, which equity considers her capable of entering into; and it would be a very strong proposition to say, that, when she has, by an instrument under her hand, acknowledged her debt and promised to pay it, she is not to be considered as creating an obligation which binds her. There is, however, no ground for supporting such a proposition, and it would be interfering very much with the rights which this court considers are attached to the property of a married woman, to put such a construction on her contract." *Post*, § 1401.

¹ [* *Re Tarsey's Estate*, 12 Jur. N. S. 370.]

² 1 De G. J. & S. 38.]

³ See *Vanderheyden v. Mallory*, 1 Comstock, 452.

courts of equity follow the analogies of the common law. If, therefore, a married woman should, during her coverture, contract debts generally, without doing any act, indicating an intention to charge her separate estate with the payment of them, courts of equity will not entertain any jurisdiction to enforce payment thereof, out of such separate estate during her life.¹

§ 1399. But, in the second place, her separate estate will, in equity, be held liable for all the debts, charges, incumbrances, and other engagements, which she does expressly, or by implication, charge thereon; for, having the absolute power of disposing of the whole, she may, *à fortiori*, dispose of a part thereof.² Her agreement, however, creating the charge, is not (it has been said) properly speaking, an obligatory contract, for, as a *feme covert*, she is incapable of contracting; but is rather an appointment out of her separate estate. The power of appointment is incident to the power of enjoyment of her separate property; and every security thereon, executed by her, is to be deemed an appointment *pro tanto*, of the separate estate.³

¹ 2 Roper on Husb. and Wife, ch. 21, § 2, p. 235 to 238; *Id.* 241, and note; *Duke of Bolton v. Williams*, 2 Ves. 138, 150, 156; S. C. 4 Bro. Ch. R. 297; *Jones v. Harris*, 9 Ves. 498; *Stewart v. Kirkwall*, 3 Madd. R. 387; *Greatley v. Noble*, 3 Madd. R. 94; *Aguilar v. Aguilar*, 5 Madd. R. 418. The qualification, "during her life," is important; for it has been said, that after her death such general creditors will be entitled to satisfaction out of her assets. But then, though they may be creditors by bond, they will not be entitled to any preference, but must come in *pari passu* with her simple contract creditors. (2 Roper on Husb. and Wife, ch. 21, § 3, p. 238, 245, note citing *Anon.* 18 Ves. 258; *Gregory v. Lockyer*, 6 Madd. R. 90.) The circumstances of these cases, however, do not appear; and the wife may have charged her separate estate (for aught that appears) with the payment of all her debts. But in *Norton v. Turvill*, 2 P. Will. 144, it was held, that all the separate estate of a married woman was, after her death, a trust for the payment of her debts; and upon that ground, a bond debt, contracted by her generally after marriage, was enforced against it. See *Court v. Jeffry*, 1 Sim. & Stu. 105, and Mr. Roper's note, *supra*.

² *Hulme v. Tenant*, 1 Bro. Ch. R. 16, 20; S. C. 2 Dick. 560; *Brown v. Like*, 14 Ves. 302; 2 Roper on Husb. and Wife, ch. 21, § 3, p. 240, 241, 247, 248; *Peacock v. Monk*, 2 Ves. 90; *Grigby v. Cox*, 1 Ves. 517; *Greatley v. Noble*, 3 Madd. R. 94.

³ *Stuart v. Lord Kirkwall*, 3 Madd. 387; *Greatley v. Noble*, 3 Madd. R. 94; *Field v. Sowle*, 4 Russ. R. 112. The language of the last case may be presumed to apply to the express power of appointment therein given. But the language of the other cases seems intentionally general. See also *Aguilar v. Aguilar*, 5 Madd. 418. But see *Owens v. Dickenson*, 1 Craig & Phillips, 48, 52 to 54.

§ 1399 *a*. Upon the ground of interest, as well as power, where freeholds are conveyed by release to trustees, to the use of a *feme covert*, for her separate use for life, or to the use of such person as she should, by writing sealed, &c., appoint, and in default of such appointment in trust, to pay the rents to her for her separate use, and the husband and wife, by writing not under seal, for valuable consideration, undertook to execute a mortgage of the property, when required; and her husband died before any mortgage was executed; it was held, that the agreement was binding upon the surviving wife.¹ [In a later case, a *feme covert* who held real estate to her separate use, together with her husband, contracted to convey the property, but before the sale was completed, the wife died, having devised the estate to her husband. It was doubted whether the contract was binding on the wife; the Master of the Rolls saying that the separate use was established for the protection of the wife against the husband, and not to increase her power of disposition.²]

§ 1400. The great difficulty, however, is, to ascertain what circumstances, in the absence of any positive expression of an intention to charge her separate estate, shall be deemed sufficient to create such a charge; and what sufficient to demonstrate an intention to create only a general debt. It is agreed that there must be an intention to charge her separate estate, otherwise the debt will not effect it. The fact, that the debt has been contracted during the coverture, either as a principal or as a surety, for her-

¹ *Stead v. Nelson*, 2 Beavan, R. 245, 248. On this occasion Lord Langdale said: "This estate was vested in Mrs. Waterworth for her life, for her separate use. Now, supposing a legal estate to have been vested in her, a court of law would take no notice of the words 'for her separate use,' but in this court those words would give her, during coverture, the same right over the estate as she would have had if she had been a *feme sole*. Having that right, she enters into a contract, whereby, in consideration of a sum of £120, she agrees to execute a mortgage of this estate. That which was vested in her, and over which her power extended, was her life-estate. It is true, that her life might be prolonged beyond the life of her husband; if so, the consequence would be, that she would then have, both in equity as well as at law, an absolute power of disposition over that life-estate, and I cannot say that I think that the analogy of a reversionary interest in a *chose in action*, in any way applies to this case. It appears to me that she had a power to enter into this agreement, which must be specifically performed with costs, and it must be declared, that the plaintiff's mortgage is entitled to priority over that of Mr. Tolson."

² *Harris v. Mott*, 7 Eng. Law & Eq. R. 245.

self, or for her husband, or jointly with him, seems ordinarily to be held *primâ facie* evidence to charge her separate estate, without any proof of a positive agreement or intention so to do.¹ It has been remarked, that this rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as *primâ facie* an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity, founded more upon a desire to do justice, than upon any satisfactory reasoning. The main argument in favor of it seems to be, that the security must be supposed to have been executed, with the intention that it shall operate in some way;

¹ *Hulme v. Tenant*, 1 Bro. Ch. R. 16; *S. C.* 2 Dick. 560; *Heatley v. Thomas*, 15 Ves. 596; *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Lord Kirkwall*, 3 Madd. R. 387. See *Gardner v. Gardner*, 22 Wend. 526; *Owens v. Dickenson*, 1 Craig & Phillips, 48, 52 to 54; *Coleman v. Wooley*, 10 B. Monroe, 320; *Ante*, 1397, note; *Crosby v. Church*, 3 Beavan, R. 489. In this last case, Lord Langdale said: "If a married woman could not dispose of her separate estate, without making a direct reference to it, or without showing an express intention to charge it, there would be an end of the question; but I apprehend there are many ways in which a married woman may render her separate property liable to a charge, without having, in the transaction, made any direct charge on, or made any reference to, the property settled to her separate use." In *Tullett v. Armstrong*, 4 Beavan, R. 319, 323, the same learned judge used language still more comprehensive. "It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate; and, therefore, the inference is conclusive, that there was an intention, and a clear one, on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear, that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part; where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her, and where it must consequently be left to mere inference, whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate."

and, that it can have no operation, except as against her separate estate. If this reasoning be correct, it will equally apply to all her general pecuniary engagements; for she has no other means of satisfying them, except out of her separate estate.¹ To this extent the doctrine has not, as yet, been established, although the tendency of the more recent decisions is certainly in that direction. Indeed, it does seem difficult to make any sound or satisfactory distinction on the subject as to any particular class of debts, since the natural implication is, that, if a married woman contracts a debt, she means to pay it; and if she means to pay it, and she has a separate estate, that seems to be the natural fund, which both parties contemplate as furnishing the means of payment.²

¹ 2 Roper on Husband and Wife, ch. 21, § 3, p. 243, 244, note.

² This subject was a good deal discussed in *Murray v. Barlee*, 4 Sim. R. 82, by the Vice-Chancellor, and, on appeal of that case, by Lord Chancellor Brougham, in 3 Mylne & Keen, 209, in which he affirmed the Vice-Chancellor's decision, and acted upon the ground stated in the text. On that occasion his lordship said: "That at law, a *feme covert* cannot in any way be sued, even for necessities, is certain. Bind herself, or her husband, by specialty, she cannot; and, although living with him, and not allowed necessities, or apart from him, whether on an insufficient allowance, or an unpaid allowance, she may so far bind him, that those who furnish her with articles of subsistence, may sue him; yet even in respect of these, she herself is free from all suit. This is her position of disability or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is not more recognized than is the *cestui que trust* or the mortgagor, the legal estate, which is the only interest the law recognizes, being in others. But though this is now settled law, we know that it was not always so; or, at least, that an exception was admitted to what all men allow to be the general rule. When *Corbett v. Poelnitz* was decided, Lord Mansfield said, that, as times alter, new customs and manners arise; and he held, with the concurrence of all his learned brothers, that where the wife has a separate maintenance, and lives apart from her husband, receiving credit upon the possession of that estate, she ought to be bound; and the action was accordingly held to lie. That this great and accomplished judge imported his views on the subject from those courts of equity which he had once adorned as an advocate, I have no doubt. But it is certain that the decision never received the assent of Westminster Hall. That those who pronounced it very strongly adhered to it, there can be no question. Mr. Justice Buller, sitting in this court a few years after, recites it among other clear points, and plainly refers to it more emphatically than to the rest, in these words: 'All these things have been determined, and I know no reason why these decisions should not be religiously and as sacredly observed as any judgment, in any time, by any set of men. I believe they are founded in good sense, and are adapted to the transactions, the understanding, the welfare of mankind.

§ 1401. In the earlier cases, indeed, the doctrine was put upon the intelligible ground, that a married woman is, as to her sep-

Compton *v.* Collinson. He adds, that the reasons on which these decisions were founded, were so satisfactory both to the parties interested and to the profession, that no writ of error had ever been brought. It happened, however, that this was a very groundless panegyric. The profession were always much divided upon the point, and, latterly, the general opinion was against it. A case for the opinion of the Court of Common Pleas was directed by Mr. J. Buller, in Compton *v.* Collinson; and though the certificate of the judges, when that case came to be argued, was in conformity with the law, as then laid down by Lord Mansfield, yet Lord Loughborough, in delivering the judgment of the court, observed, after an elaborate review of the cases, that it could not be considered as a settled point that an action might be maintained against a married woman, separated from her husband by consent, and enjoying a separate maintenance. A few years afterwards, that judgment, which had been pronounced to be as worthy of religious and sacred observance as any judgment ever delivered, was overruled on the fullest consideration, and after two arguments, by the unanimous determination of all the judges. Marshall *v.* Rutton. The doors of the courts of common law were thus shut against an admission of the equitable principle; and the law was fixed, that in those courts, the wife could in no way be sued by reason of her having separate property, and living apart from her husband. But, in equity, the case is wholly different. Her separate existence, both as regards her liabilities and her rights, are here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and her trustees. It may be added, that the current of decisions has generally run in favor of such recognition. The principle has been supposed to be carried further in Hulme *v.* Tenant, than it had ever been before, because there a bond, in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate, vested in trustees, to her separate use, though such estate could be only reached by implication; and though, till then, the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never in decision departed from by himself. It is enough to mention Heatley *v.* Thomas, and Bullpin *v.* Clarke, both before Sir William Grant, who, in the latter case, held the wife's separate estate to be charged by a promissory note for money lent to her; which at law could never have charged the husband in any way, directly or indirectly. The same was held as to a bill of exchange, accepted by a *feme covert*, in Stuart *v.* Lord Kirkwall, and an agreement by the wife, as to her separate estate, in Master *v.* Fuller. In all these cases I take the foundation of the doctrine to be this:—the wife has a separate estate subject to her own control, and exempt from all other interference or authority. If she cannot affect it no one can; and the very object of the settlement, which vests it in her exclusively, is to enable her to deal with it as if she were *discovert*. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly incumbered it. At first, the court seems to have supposed that

arate property, to be deemed a *feme sole*; and, therefore, that her general engagements, although they would not bind her person, nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always, of course, considered as made in execution of it. But so, if, by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory, if done by a *feme covert* without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing, if it means not to execute a power, has been held to be made in execution of that power, although no direct reference is made to the power. Such is the principle, and it goes the full length of the present case. But doubts have been, in one or two instances, expressed, as to the effect of any dealing, whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatley v. Noble*; and the present Master of the Rolls appears, in the subsequent case of *Stuart v. Lord Kirkwall*, to have been of opinion, that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley v. Noble*, although he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point. I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is, in equity, taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing, where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways; as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge v. Delavall*, makes no mention of such a distinction, for there, being indebted generally, is all that is stated as grounding the claim; and in *Lilia v. Airey*, the party who had furnished necessary supplies to the wife was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for £60; the court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount

should bind her separate property.¹ This, however, (as we have seen,) is not the modern doctrine; for by that it seems to turn upon the intention of the married woman to create a charge on her separate estate, either as an appointment, or as a disposition of it by a contract in the nature of an appointment.² The diffi-

of the bond. But the present is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie; but there are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney, acting under that retainer. So, if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing, to proceed further, the party who gives such written instructions in effect promises to pay whatever may lawfully become due to one acting in obedience to them, that is, to pay the costs which shall be taxed. The present case is, in almost the whole, if not the whole of it, covered by such written authority, although such written authority was not necessary to bind Mrs. Barlee's separate estate. I am of opinion, therefore, that the decree of his honor, ordering the solicitor's bill to be taxed, is well founded. Nothing could more effectually defeat the very purpose of such settlements than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions from all oppression and circumvention, and to be made independent of her husband, as well as of all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can by a verbal retainer engage a solicitor, while she can only obtain such help by executing a mortgage, or by granting bonds or notes, she is not on the same footing with them. I hold, therefore, that, so far from a solicitor's or attorney's bill being less entitled to favor in courts of equity when sued upon, as against the separate estate of a married woman, the argument is all the other way." See also the learned note of Mr. Roper, in his *Treatise on Husband and Wife* (ch. 21, § 3, p. 241 to 247), which contains a very elaborate review of the leading authorities, and, in a great measure, exhausts the subject. From that note the materials in the text have been partly drawn. See also Clancy on *Married Women*, ch. 9, p. 331 to 346. In *Vandergucht v. De Blaquiére*, 8 Sim. R. 315, the Vice-Chancellor held, that where a married woman, divorced from her husband, and entitled to alimony under a decree of the Ecclesiastical Court, accepted a bill of exchange for articles of dress, supplied to her by the drawer of the bill, and made it payable at her banker's, to whom the alimony was paid, she did not thereby charge her alimony.

¹ *Hulme v. Tenant*, 1 Bro. Ch. R. 16, and Mr. Belt's note; *Peacock v. Monk*, 2 Ves. 193; *Norton v. Turvill*, 2 P. Will. 144; *Lilia v. Airey*, 1 Ves. Jr. 277, 278; *Mansfield, C. J.*, in *Nurse v. Craig*, 5 Bos. & Pull. 162, 163; *Angell v. Hadden*, 2 Meriv. R. 163.

² 2 Roper on *Husb. & Wife*, ch. 21, § 3, p. 243, note; *Sperling v. Rochfort*, 8 Ves. 175 to 178; *Jones v. Harris*, 9 Ves. 497, 498; *Whistler v. Newman*, 4 Ves. Jr. 129; *Stuart v. Kirkwall*, 3 Madd. R. 387; *Field v. Sowle*, 4 Russ. 112; *Mansfield, C. J.*,

culty, then, is to distinguish, upon any clear reasoning, what ground of general presumption exists to infer an intention, not expressed, to charge any particular debt upon her separate estate, which would not ordinarily apply to all her general debts. If she gives a promissory note, or an acceptance, or a bond, to pay her own debt, or if she joins in a bond with her husband to pay his debts, the decisions have gone the length of charging it on her separate estate, either as a contract, or as an appointment, without any distinct circumstance establishing her intention.¹ Where, indeed, she lives apart from her husband, and has a separate estate and maintenance secured to her, there may be good ground to hold, that all her debts, contracted for such maintenance, and in the course of her dealings with tradesmen, are understood by both parties to be upon the credit of her separate funds for maintenance.²

[* § 1401 *a*. So late as (March, 1861,) this subject underwent a careful examination in the Court of Appeal in Chancery; and after a thorough revision of the leading cases upon the subject from the earliest period, Lord Justice Turner, who delivered the leading opinion, came to the conclusion, that a court of equity having created for married women a separate estate, has enabled them to contract debts in respect of it; and that their separate estate may be subjected to the payment of such debts; and that a court of equity will give execution against it. But that something more is necessary to bind the separate estate of a married woman, than the mere existence of such facts as would create a debt against a single woman. It should appear that an engagement was made with reference to and upon the faith or credit of the estate. That where a married woman, living apart from her husband and having separate estate, contracts debts, the court will in *Nurse v. Craig*, 5 Bos. & Pull. 162, 163. But see *Owens v. Dickenson*, 1 Craig & Phillips, 48, 52 to 54; *Ante*, § 1397, note.

¹ *Stanford v. Marshall*, 2 Atk. 68; *Hulme v. Tenant*, 1 Bro. Ch. R. 16; S. C. 2 Dick. 560; *Master v. Fuller*, 4 Bro. Ch. R. 19; S. C. 1 Ves. Jr. 513; *Stuart v. Kirkwall*, 3 Madd. R. 387; *Field v. Sowle*, 4 Russ. R. 112; *Bullpin v. Clarke*, 17 Ves. 365; *Heatley v. Thomas*, 15 Ves. 596; *Power v. Bailey*, 1 B. & Beatt. 49; *Wagstaff v. Smith*, 9 Ves. 520; *Clerk v. Miller*, 2 Atk. 379; *Clancy on Married Women*, ch. 9, p. 331 to 346. But see *Thorneycroft v. Crockett*, 2 House of Lords' Cases, 239.

² 2 Roper on *Husb. & Wife*, ch. 21, § 3, p. 244, 245, note; *Ibid.* ch. 22, § 4, p. 305 to 307; *Gaston v. Frankum*, 13 Jurist, 739; *Lilia v. Airey*, 1 Ves. Jr. 277; *Mansfield, C. J.*, in *Nurse v. Craig*, 5 Bos. & Pul. 162, 163.

impute to her the intention of dealing with her separate estate, unless the contrary is shown.¹ But where the wife becomes a party to an accommodation note, as surety merely, her separate estate is not liable for the payment of it, unless she expressly charge it for that purpose.²

§ 1401 *b*. The separate estate of a married woman is liable for all her debts charged thereon, either expressly or by fair implication, and the creditor may maintain a bill in equity to enforce his claim against such estate. Such claim will be protected by injunction. Something more is required to create such a charge than the mere fact that debts are created by the woman during coverture.³

§ 1401 *c*. A married woman may lawfully contract, in regard to her separate estate, and will be entitled to the benefit of such contract. With the assent of the husband and father, the labor of the wife and children may be bestowed upon the separate estate of the wife, and thus enure to her benefit.⁴

§ 1402. In the next place, let us proceed to the consideration of what is commonly called the equity of a wife to a settlement out of her own property. It is well known, that, at the common law, marriage amounts to an absolute gift to the husband of all the goods, personal chattels, and other personal estate of which the wife is actually or beneficially possessed at that time, in her own right, and of such other goods, personal chattels, and personal estate as come to her during the marriage.⁵ But to her choses in action, such as debts due by obligation, or by contract, or otherwise, the husband is not absolutely entitled, unless they are reduced into possession during her life.⁶ In regard to chattels real, of which the wife is, or may be possessed during the cov-

¹ [* *Johnson v. Gallagher*, 7 Jur. N. S. 273. The same principle is maintained in *Dillon v. Grace*, 2 Sch. & Lefr. 456. See also *Vaughn v. Vanderstegen*, 2 Drew, 165, 363; *Ante*, § 1397.

² *Willard v. Eastham* (Sup. Court, Mass.), 23 Law Rep. 684.

³ *Oakley v. Pound*, 1 McCarter, 178.

⁴ *Johnson v. Vail*, 1 McCarter, 423.]

⁵ 1 Roper on Husb. & Wife, ch. 5, § 2, p. 169; Co. Litt. 300, 351 *a*, and Butler's note (1); Com. Dig. *Baron & Feme*, E. 3; Clancy on Marr. Women, B. 1, ch. 1, p. 1 to 3.

⁶ Co. Litt. 351 *a*, and Mr. Butler's note (1); 2 Roper on Husb. and Wife, ch. 5, § 4, p. 204, 205; Clancy on Married Women, B. 1, ch. 1, p. 3 to 9; Perdw. v. Jackson, 1 Russ. R. 66.

verture, the husband has a qualified title. He has an interest therein in her right; and he may, by his alienation during the coverture, absolutely deprive her of her right therein. But if he does not aliene them, she will be entitled to them, if she survives him; and, if he survives her, he will be entitled to them in virtue of his marital rights.¹

§ 1403. These general explanations of the state of the common law, as to the respective rights of husband and wife in regard to her personal property, are sufficient to enable us to understand the origin, nature, and character of the wife's equity to a settlement. We have already seen the protective power which courts of equity exert to preserve the control and disposition of married women over property secured or given to their separate use, and also to preserve the rights and interests of wards of the court. Whenever the husband has reduced the personal estate of his wife, of whatever original nature it may be, whether legal or equitable, into possession, he becomes thereby the absolute owner of it, and may dispose of it at his pleasure.² And this being the just exercise of his legal marital rights, courts of equity will not interfere to restrain or limit it.³ Wherever, also, he is pursuing the common remedies at law, for the purpose of reducing such personal property into possession, courts of equity for the same reason are, or at least (it is said) ought to be, ordinarily passive.⁴ We say, ordinarily; because it is not, perhaps, quite certain, that courts of equity will not interfere by way of injunction to suits at law for the wife's personal property against the husband under special circumstances. In one class of cases, that of legacies to the wife, when they are sued for by the husband in the ecclesiastical

¹ 2 Roper on Husb. and Wife, ch. 5, § 2, p. 173 to 187; Ibid. Addenda, No. 3, p. 221; Clancy on Marr. Women, B. 1, ch. 1, p. 9 to 11; Co. Litt. 46 b; Ibid. 251 b, and Butler's note (1); Doe v. Polgrean, 1 H. Black. 535; Com. Dig. *Baron & Feme*, E. 2, F. 1; Pale v. Mitchell, 2 Eq. Abr. 138, p. 4; Donne v. Hart, 2 Russ. & Mylne, 360; Post, § 1410, 1413. But see Bisset on Estates for Life, 187, 188, 192, 193, 195.

² Clancy on Marr. Women, B. 5, ch. 1, p. 442 to 444; Jewson v. Moulson, 2 Atk. 420; Murray v. Elibank, 10 Ves. 90. See, as to what will be a reduction into possession by the husband of the wife's choses in action, or not, Searing v. Searing, 9 Paige, R. 283; Mardree v. Mardree, 9 Iredell, 295; Latourette v. Williams, 1 Barbour, 9.

³ Ibid.

⁴ 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k); Vaughan v. Buck, 13 Simons, R. 404; S. C. 1 Phillips, R. 75.

tical courts, it is certain that an injunction will be allowed for the purpose of enforcing the wife's equity to a settlement.¹

§ 1404. The principal if not the sole cases in which courts of equity now interpose to secure to the wife her equity to a settlement are, first, where the husband seeks aid or relief in a court of equity in regard to her property; secondly, where he makes an assignment of her equitable interests; thirdly, where she seeks the like relief, as plaintiff, against her husband, or his assignees, in regard to her equitable interests.² In the first case, the court lays hold of the occasion, upon the ground of the maxim that he who seeks equity must do equity, to require the husband to make a suitable settlement upon the wife (if not already made) out of that property, or some other property, for her due maintenance and support, in case of her survivorship, according to the rank,

¹ *Ante*, § 591, 592, 598, 599, 898; Anon. 1. West, R. 581; Clancy on Married Women, B. 5, ch. 1, p. 443, 463, 464; Jewson v. Moulson, 2 Atk. 419, 420; Harrison v. Buckle, 1 Str. 238; Gardner v. Walker, 1 Str. 503. There are instances in which bills in equity have been entertained to restrain the husband from enforcing his legal remedies to reduce his wife's choses in action into possession, for the purpose of enforcing her equity to a settlement. Winch v. Page, Bund. R. 86; Mason v. Masters, cited in 1 Eden, R. 506. See also Jewson v. Moulson, 2 Atk. 420; Ellis v. Ellis, 1 Viner, Abrid. Suppt. 476; Clancy on Marr. Women, B. 5, ch. 2, p. 463, 464; Id. 466 to 470; 1 Roper on Husb. and Wife, ch. 7, § 1, p. 257, 258; Id. 274. Mr. Clancy insists that there is no just ground upon which the courts of equity should decline to interfere in cases where the husband is seeking at law to recover the wife's legal choses in action. His reasoning is entitled to great consideration from its intrinsic force, and there are certainly authorities in his favor, although he admits that the prevalent spirit of the cases is against it. Clancy on Marr. Women, B. 5, ch. 2, p. 466 to 470. Mr. Jacob, in his late edition of Roper on Husb. and Wife (Vol. 1, 271, 272), expressly denies that there is any sound principle for making a distinction between a trust term and any other equitable chose in action of the wife. It were to be wished that the principle could, as a matter of general justice, be maintained in equity. In Pierce v. Thornley (2 Sim. R. 167), the Vice-Chancellor held a doctrine which seems to cover the very case. "At law," said he, "where judgment had been recovered by the husband and wife, the husband alone could levy execution. But a court of equity will not, unless the wife consents, permit the husband to recover the whole of his wife's choses in action, but will require a settlement to be made upon her." See also Kenny v. Udall, 5 Johns. Ch. R. 477; and Van Epps v. Van Deusen, 4 Paige, R. 74. In the latter case, Mr. Chancellor Walworth was of opinion that an injunction ought to go to a proceeding at law, in order to enforce the wife's equity to a settlement.

² Clancy on Marr. Women, B. 5, ch. 1, p. 441, 445; Id. ch. 2, p. 456; *Post*, § 1414.

and condition, and circumstances of the parties.¹ In the second case, the same principle is applied to other persons claiming under the husband as to himself. In the third case, the doctrine may seem more artificial. But it is, in truth, enforcing against the husband her admitted equity to prevent an irreparable injustice.²

§ 1405. The general theory of this branch of equity jurisprudence may be thus succinctly stated. By marriage the husband clearly acquires an absolute property in all the personal estate of his wife, capable of immediate and tangible possession. But if it is such as cannot be reduced into possession, except by an action at law, or by a suit in equity, he has only a qualified interest therein, such as will enable him to make it an absolute interest by reducing it into possession. If it is a chose in action, properly so called, that is, a right, which may be asserted by an action at law, he will be entitled to it, if he has actually reduced it into possession (for a judgment is not sufficient) in his lifetime. But if it is a right, which must be asserted by a suit in equity, as where it is vested in trustees, who have the legal property, he has still less interest. He cannot reach it without application to a court of equity, in which he cannot sue without joining her with him; although perhaps a court of law might permit him to do so, or at least to use her name without her consent. If the aid of a court of equity is asked by him in such a case, it will make him provide for her, unless she consents to give such equitable property to him.³

§ 1406. It is called the wife's equity. But in truth it is never limited to the wife; for, in all cases where a settlement is decreed, it is the invariable practice to include a provision for the issue of the marriage, through the instrumentality of the equity of the wife.⁴ This equity will not only be administered at the

¹ Clancy on Marr. Women, B. 5, ch. 1, p. 441, 442; *Beresford v. Hobson*, 1 Madd. 363; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k).

² Clancy on Marr. Women, B. 5, ch. 2, p. 470 to 475. In *Edes v. Edes*, 11 Simons, R. 569, 570, the Vice-Chancellor (Sir L. Shadwell) said: "Where a wife is entitled to a chose in action which consists of a principal sum, and not merely income, she may file a bill against her husband and the trustees for a settlement."

³ *Langham v. Nenny*, 3 Ves. Jr. 469; *Bond v. Simmons*, 3 Atk. 20, 21.

⁴ *Ibid.*; *Murray v. Lord Elibank*, 13 Ves. 6; *Steinmetz v. Halthin*, 1 Glyn & Jam. R. 64; S. C. cited in *Pierce v. Thornley*, 2 Sim. R. 167; *Wilson v. Wilson*,

instance of the wife and her trustees, but also where the husband sues in equity for her property, at the instance of her debtor.¹ We shall presently see in what manner the wife may waive the right to such a settlement, and what will be the effects of her waiver, and what other circumstances will deprive her and her issue of the right.²

§ 1407. It is not easy to ascertain the precise origin of this right of the wife, or the precise grounds upon which it was first established. It has been said that it is an equity grounded upon natural justice; that it is that kind of parental care which a court of equity exercises for the benefit of orphans, and that as a father would not have married his daughter without insisting upon some provision, so a court of equity, which stands *in loco parentis*, will insist on it.³ This is not so much a statement of the origin as it is of the effect and value of the jurisdiction. The truth seems to be, that its origin cannot be traced to any distinct source. It is a creature of a court of equity, and stands upon its own peculiar doctrine and practice. It is in vain to attempt, by general reasoning, to ascertain the nature or extent of doctrine, and therefore we must look entirely to the practice of the court for its proper foundation and extent.⁴

§ 1408. And, in the first place, a settlement will be decreed to the wife whenever the husband seeks the aid or relief of a court of equity to procure the possession of any portion of his wife's fortune.⁵ In such a case, it is of no consequence whether the fortune accrues before or during the marriage; whether the property

1 Jac. & Walk. 459, 460. In the Matter of Anne Walker, 1 Lloyd & Goold's Rep. 299, 323.

¹ Clancy on Marr. Women, B. 5, ch. 1, p. 465; Davy v. Pollard, Finch, Ch. R. 377; S. C. 1 Eq. Abridg. 64, pl. 2.

² See *Post*, § 1416. In the Matter of Anne Walker, 1 Lloyd & Goold's Rep. 299.

³ Jewson v. Moulson, 2 Atk. 419; Kenney v. Udall, 5 Johns. Ch. R. 474.

⁴ Murray v. Elibank, 10 Ves. 90; S. C. 13 Ves. 6.

⁵ Jewson v. Moulson, 2 Atk. 419, 420; Slesch v. Thorington, 2 Ves. 561; Attorney-General v. Whorwood, 1 Ves. 538, 539; Bosvil v. Brander, 1 P. Will. 459, Mr. Cox's note; Howard v. Moffat, 2 Johns. Ch. R. 206, 208; Fabre v. Colden, 1 Paige, R. 166; Smith v. Kane, 2 Paige, R. 303; Clancy on Marr. Women, B. 5, ch. 2, p. 456 to 475; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k); Sturgis v. Champneys, 5 Mylne & Craig, 97, 101 to 104; Hanson v. Keating, The Jurist, 1844, Vol. 8, p. 549; Carter v. Carter, 14 Smedes & Marshall, 59; Shaw v. Mitchell, Daveis, R. 216.

consists of funds in the possession of trustees, or of third persons; or whether it is in the possession of the court, or under its administration, or not; for, under all these circumstances, the equity of the wife will equally attach to it.¹ This equity of the wife was for a long time supposed to be confined to the absolute personal property of the wife. It was afterwards extended to the rents and profits of the real estate, in which she has a life-interest,² although it was not then generally extended as against the husband personally, to equitable interests, in which she had a life-estate only.³

¹ 2 Roper on Husb. and Wife, ch. 7, § 1, p. 259.

² Clancy on Marr. Women, B. 5, ch. 1, p. 445; *Burdon v. Dean*, 2 Ves. Jr. 607; *Sturgis v. Champneys*, 5 Mylne & Craig, 97, 101 to 103.

³ *Elliot v. Cordell*, 5 Madd. R. 155, 156. In this case a legacy was given to a married woman of the dividends of £9,000 three per cent during her life, with a bequest over. The husband and wife joined in a sale of her life-estate, and he became bankrupt. The wife afterwards filed a bill for a provision against the purchaser; but it was refused. The Vice-Chancellor (Sir John Leach) on that occasion, said: "I find no authority for the equity claimed by the wife as against the particular assignee, in the case of an interest given to the wife for her life; and it does not follow as a corollary or consequence from any established doctrine of the court. Where an absolute equitable interest is given to the wife, the court will not permit the husband to possess it without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest subject to the same equity. But where an equitable interest is given to the wife for her life only, this court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true, that, if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife. And if the husband becomes bankrupt, or takes the benefit of an insolvent debtor's act, this court will fasten the same obligation of maintaining the wife out of the property of this description, which devolves, by act of law, upon the general assignee; for, when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife. But the same principle does not necessarily apply to a particular assignee for a valuable consideration, who purchased this interest, when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it. If, however, I considered it to be useful that the same rule should be applied to the particular assignee, as to the general assignee, which may be doubted, by declaring this rule, in the absence of all direct authority, and of all authority leading necessarily to the same conclusion, I fear that I should not be administering the actual law of this court, but I should be making a new law, and I cannot venture to assume such a jurisdiction." In *Stanton v. Hall*, 2 Russ. & Mylne, 175, a devise was in trust to A., the husband, for life, of certain rents and profits; if he attempted to assign the same, or became

It seems now to have acquired a wider range, and is at present applied to all cases of the real estate of the wife, whether legal or equitable, where the husband or his assignee is obliged to come into a court of equity to enforce his rights against the property.¹

[*§ 1408 *a*. Where there is a charge upon real estate for the benefit of a married woman, which a court of equity has jurisdiction to raise, making a provision for the wife; if there is an attempt to raise the charge by other means, with a view to defeat the wife's equity to a settlement, a court of equity will restrain the proceedings, and make the same provision for her which she would have obtained had she sued for it before any attempt to raise it by other means.²]

§ 1409. There are some exceptions to the general doctrine, however, which deserve notice. In the first place, if both the husband and wife are subjects of, and residents in, a foreign coun-

bankrupt or insolvent, then upon trust to pay his wife an annuity of £100 during his life, and after his death, an annuity to his widow of £30. It was held, that the annuity was not the separate estate of the wife, but passed to the husband's assignee for value, and that against that assignee the wife had no equity for a settlement out of the annuity. On that occasion, the Lord Chancellor (Brougham) said: "The case involves the question, how far a married woman, to whom an annuity for life was bequeathed in terms, which have been adjudged not to vest in her as her separate estate, is entitled to claim a settlement out of it, against one, who was a purchaser for valuable consideration from her husband, the husband having afterwards become insolvent. And, as *Elliot v. Cordell*, if it should be held to be law, decides the question, I have looked with some attention into that case, and also into the former authorities, and I find no warrant for supposing that *Elliot v. Cordell* introduced any new doctrine upon the subject. The same doctrine, in principle, was recognized long before by Sir W. Grant; although, undoubtedly, neither in *Mitford v. Mitford* (9 Ves. 87), nor in *Wright v. Morley* (11 Ves. 12), was the point raised and disposed of formally. It was, however, repeatedly referred to in those cases; and it is perfectly plain, from the language there used, that the opinion of Sir W. Grant would have excluded the wife's claim, as against particular assignees. If the question were now, for the first time raised, whether courts of equity had not gone further than principle warranted, in allowing the claim against particular assignees, in cases where a capital sum is at stake, some doubt might, perhaps, be entertained. But, in a case like *Elliot v. Cordell*, where the question related to a mere life-interest, and where, prior to the assignment, there was no failure on the part of the husband to maintain his wife, the Vice-Chancellor would have gone a great step further, had he listened to the argument in favor of the wife's equity." *Post*, § 1417.

¹ *Sturgis v. Champneys*, 5 Mylne & Craig, 97, 105 to 107; *Hanson v. Keating*, *The Jurist*, 1844, Vol. 8, p. 949; *Ibid.* 465, 466; *Post*, § 1410.

² [* *Duncombe v. Greenacre*, 7 Jur. N. S. 175 (December, 1860).]

try, where he would be entitled to his wife's fortune without making any settlement upon her, in such a case, courts of equity, sitting in another jurisdiction, will, as to personal property of the wife within their jurisdiction, follow the local law, and do what the local tribunals would ordain under similar circumstances; for the rights of the husband and wife are properly subject to the local law of their own sovereign.¹

[*§ 1409 *a*. But where an Englishwoman married a domiciled Frenchman, who had obtained provisional letters of naturalization in England, and articles were concluded between the parties before the marriage, in the English form, securing to the wife £ 200 a year, the husband having afterwards separated from his wife and obtained a decree of condemnation against her for adultery, in the French courts, it was nevertheless held, that the marriage was English, and the rights of the parties were to be governed by the English law; and further property having come to the wife, and the moral conduct of both parties being reprehensible, the income of the fund was divided equally between them.² But where an Englishman married a Frenchwoman, in England, and afterwards became domiciled in France for a long period, where five children of the marriage were born; and controversies having arisen, a contract in the French language, without the intervention of trustees, was entered into between them, one party executing it in France, and the other in England, for the purpose of bringing about an amicable arrangement; and the wife filed a bill against the husband for specific performance; it was held, on demurrer, that the case did not exclude questions of international law, and that they were too important to be decided on demurrer.³]

§ 1409 *b*. It has, however, been said, and with great apparent force, that the equity which a court of equity "administers in securing a provision and maintenance for the wife, is founded upon the well-known rule of compelling a party who seeks equity to do equity; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life-estate of the wife, upon the ground that he is liable to maintain her, and makes no provision

¹ *Sawyer v. Shute*, 1 Anst. R. 63.

² [* *Watts v. Shrimpton*, 21 Beavan, 97.

³ *Hope v. Hope*, 22 Beavan, 351.]

for the event of his failing or becoming unable to perform that duty. If the life-estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this court, equity, though it follows the law, therefore gives the husband or his assignee the life-estate of the wife, yet it withholds its assistance for that purpose, until it has secured for the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both."¹ But, as we shall presently see, the doctrine is even applied to cases where the wife actively seeks to assert her equity as plaintiff;² so that the maxim scarcely seems to meet the exigencies of such a case.³

§ 1410. Another exception seems to be, where the wife's property is a leasehold estate, or a term for years, held in trust for her. In such a case, it has been said, that the husband may assign the term for a valuable consideration, and thereby dispose of it, without the wife having any claim against his assignee; and if he does not dispose of it, there is some doubt whether the wife has any equity against him.⁴ It is extremely difficult to perceive the exact grounds upon which this exception rests. It constitutes a seeming anomaly, resting more upon authority than principle; and, as such, it has been several times doubted,⁵ and perhaps ought now to be deemed overruled.⁶ But however questionable it may be

¹ *Sturgis v. Champneys*, 5 Mylne & Cr. 105.

² *Ibid.*

³ See *Hanson v. Keating*, *The Jurist*, 1844, Vol. 8, p. 949.

⁴ *Turner's case*, 1 Vern. 7; *Pitt v. Hunt*, 1 Vern. 18; S. C. 1 Eq. Abr. 58, pl. 1, 3; *Jewson v. Moulson*, 2 Atk. 420, 421; Co. Litt. 351 a; *Butler's note* (1); *Newland on Contr.* ch. 7, p. 124 to 127; *Atherley on Marr. Sett.* ch. 23, p. 345 to 348; *Bosvil v. Brander*, 1 P. Will. 459, and *Mr. Cox's note* (1); *Tudor v. Samyne*, 2 Vern. 270; *Packer v. Wyndham*, *Prec. in Ch.* 418, 419; *Walter v. Saunders*, 1 Eq. Abr. 58; *Bates v. Dandy*, 2 Atk. 208; S. C. 3 Russ. R. 72, note; *Id.* 76; *Ante*, § 1402.

⁵ See *Mr. Raithby's note* to *Turner's case*, 1 Vern. 7; *Jewson v. Moulson*, 2 Atk. R. 417, 420; *Sturgis v. Champneys*, 5 Mylne & Cr. 97, 106, 107; *Hanson v. Keating*, *The Jurist*, 1844, Vol. 8, p. 949; *Macaulay v. Phillips*, 4 Ves. 19; *Franco v. Franco*, 4 Ves. 528; *Clancy on Married Women*, B. 5, ch. 4, p. 507, 508; *Mr. Cox's note* (1) to *Bosvil v. Brander*, 1 P. Will. 459; *Doyly v. Perfull*, 1 Ch. Cas. 225; *Atherley on Marr. Sett.* ch. 23, p. 345 to 348; 1 *Roper on Husb. and Wife*, ch. 5, § 2, p. 177, and note; *Id.* 178; *Post*, § 1413.

⁶ *Sturgis v. Champneys*, 5 Mylne & Craig, 97, 104 to 107; *Hanson v. Keating*, *The Jurist* for 1844, Vol. 8, p. 949; *Id.* 466; *Ante*, § 1408.

in its origin, and however it may seem to be at variance with the received doctrine, in other analogous cases of assignment by the husband, it has had no inconsiderable weight of judicial authority in its favor. It has even been carried to this extent, that the husband may, by his assignment of the reversionary interest in a term of years, held in trust for the wife, bind that interest, so as to deprive her of her equity therein; although he could not in the same way, dispose of her reversionary interest in any choses in action or personal chattels.¹ The sole ground of the doctrine seems to have been, that the husband may dispose of the wife's contingent, reversionary, legal interest in a term for years, and that there is no difference in equity, between the legal interests in, and the trusts of a term for years.² Perhaps these latter cases would now be deemed to be subject to the same doubts and difficulties, which affected and overcame the authority of that which has just been considered.³

§ 1411. Secondly. In regard to the wife's equity to a settlement, in cases where the husband has made an assignment of her choses in action, or other equitable interests. It has been long settled, that the assignees in bankruptcy or insolvency of the husband, and also his assignees for the payment of debts, due to his creditors generally, are bound to make a settlement upon the wife out of her choses in action, and equitable interests assigned to them, whether they are absolute interests or life-interests only in her, in the same way, and to the same extent, and under the same circumstances, as he would be bound to make one; for it is a general principle, that such assignees take the property, subject to all the equities which affect the bankrupt, or insolvent, or general assignor.⁴ Such assignees also take the property, subject to the

¹ *Donne v. Hart*, 2 Russ. & Mylne, 360; *Honner v. Morton*, 3 Russ. R. 65; *Purdew v. Jackson*, 1 Russ. R. 1; *Post*, § 1413. But see *Sturgis v. Champneys*, 5 Mylne & Cr. 97; *Scott v. Spashett*, 9 Eng. Law & Eq. R. 265; *Clark v. Cook*, 3 De Gex & Smale, 333; *Hanson v. Keating*, *The Jurist*, 1844, Vol. 8, p. 949.

² *Donne v. Hart*, 2 Russ. & Mylne, R. 361, 364.

³ *Sturgis v. Champneys*, 5 Mylne & Cr. 97; *Hanson v. Keating*, *The Jurist*, 1844, Vol. 8, p. 949; *Scott v. Spashett*, 9 Eng. Law & Eq. R. 265.

⁴ 1 *Roper on Husb. and Wife*, ch. 7, § 1, p. 268; *Clancy on Married Women*, B. 5, ch. 3, p. 476 to 493; *Id.*, ch. 4, p. 494; 1 *Madd. Ch. Pr.* 385, 386; *Jewson v. Moulson*, 2 *Atk.* 420; *Jacobson v. Williams*, 1 *P. Will.* 382; *Bosvil v. Brander*, 1 *P. Will.* 458, and *Mr. Cox's note*; *Newland on Contr.* ch. 7, p. 122 to 129; *Burdon v. Dean*, 2 *Ves. Jr.* 607, 608; *Prior v. Hill*, 4 *Bro. Ch. R.* 139, and *Mr.*

wife's right of survivorship, in case the husband dies before the assignees have reduced her choses in action and equitable interests into possession.¹

§ 1412. The principal controversy which has arisen is, whether a special assignee or purchaser from the husband, for a valuable consideration of her choses in action, or equitable interests, is bound to make such a settlement. It is now firmly established, that he is bound to make such a settlement.² But (it has been

Belt's notes; *Oswell v. Probert*, 2 Ves. Jr. 680; *Mitford v. Mitford*, 9 Ves. 87, 97, 100; *Elliot v. Cordell*, 5 Madd. R. 149; *Mumford v. Murray*, 1 Paige, R. 620; *Smith v. Kane*, 2 Paige, R. 303; *Van Epps v. Van Deusen*, 4 Paige, R. 64; *Ante*, § 1038, 1229, 1404, and notes; *Eedes v. Eedes*, 11 Simons, R. 569, 570; *Sturgis v. Champneys*, 5 Mylne & Craig, 97, 103, 104.

¹ *Pierce v. Thornley*, 2 Sim. R. 167; *Honnor v. Morton*, 3 Russ. R. 646, 8, 69; *Gayer v. Wilkinson*, 1 Bro. Ch. R. 49, and note; *Clancy on Married Women*, B. 1, ch. 8, p. 124 to 132; *Mitford v. Mitford*, 9 Ves. 87, 97, 99; *Van Epps v. Van Deusen*, 4 Paige, R. 64, 72; *Purdew v. Jackson*, 1 Russ. R. 64; *Shaw v. Mitchell*, *Daveis*, R. 216.

² 1 Roper on Husb. and Wife, ch. 7, § 1, p. 268 to 273; *Ibid.* ch. 6, § 2, p. 227 to 246; 2 Roper on Husb. and Wife, Addenda, No. 3, p. 509 to 522; *Clancy on Married Women*, B. 1, ch. 8, p. 110 to 136; *Ibid.* B. 5, ch. 4, p. 494 to 510; *Mitford v. Mitford*, 9 Ves. 87, 97, 99; *Elliot v. Cordell*, 5 Madd. R. 149; 1 Madd. Ch. Pr. 386; *Macaulay v. Phillips*, 4 Ves. 19; *Like v. Beresford*, 3 Ves. 506; *Pryor v. Hill*, 4 Bro. Ch. R. 139; *Purdew v. Jackson*, 1 Russ. R. 1, 70; *Honner v. Morton*, 3 Russ. R. 64, 68; *Pope v. Crashaw*, 4 Bro. Ch. R. 326; *Kenny v. Udall*, 5 Johns. Ch. R. 473 to 479; *S. C.* 3 Cowen, R. 590; *Harwood v. Fisher*, 1 Younge & Coll. 112; *Johnson v. Johnson*, 1 Jac. & Walk. 472, 479. In this respect, the case of general assignees differs from that of a special assignee, for a valuable consideration, if the doctrine be correct, that the latter will take against the right of the wife by survivorship. In the former case, the assignees take, subject to the wife's right by survivorship. *Mitford v. Mitford*, 9 Ves. 87, 97, 99, 100; *Ante*, § 1411. The ground of the distinction, if it exists (which is doubtful), is not, perhaps, at first sight, very obvious. But, in the case of a special assignee, it is said, that equity considers the assignment of the husband as amounting to an agreement that he will reduce the property into possession. It likewise considers that which a party agrees to do, as actually done. And, therefore, when the husband has the present power of reducing the property into possession, his assignment of the choses in action of the wife will be regarded as a reduction of it into possession. *Honner v. Morton*, 3 Russ. R. 68, 69. But why may not the same principle be applied to the case of a general assignment by the husband, for the benefit of his creditors? And, as to the rule in equity, it is a rule applicable properly to the husband himself, and to his rights. Why should it affect the right of survivorship of the wife, when there is no actual reduction into possession? See the Lord Chancellor's observations in *Druce v. Denison*, 6 Ves. 394; 2 Roper on Husb. and Wife, Addenda, No. 3, p. 509 to 522. Sir Thomas Plumer, in his able judgment in *Purdew v. Jackson* (1 Russ. R. 63, 64), said: "An opinion has cer-

said) that, subject to such provision, he will be entitled to the choses in action, and equitable interests so assigned, discharged from the title of the wife by survivorship, if she should survive him.¹ Here, again, a distinction has been insisted upon between such a special assignee, or purchaser, and a general assignee in bankruptcy, or otherwise; for, in the latter case, the wife is admitted to have an equity for a settlement out of her equitable interest for her life; whereas, in the former case, it has been said she has no such equity for a settlement; as, indeed, ordinarily, she would not have against her husband.² But there is great reason to doubt the soundness of this distinction, and the doctrine seems now firmly established by the recent authorities, that no assignment made by the husband of the wife's choses in action for a valuable consideration, which choses in action are capable of being immediately reduced into possession, will convey any right to the assignee or purchaser against the wife, if she survives her husband, and neither her nor the assignee or purchaser have reduced them into possession during the husband's lifetime;³ and that in cases of choses in action capable of being so reduced, the property belongs absolutely to the wife by right of survivorship, in the same manner as it does in case of reversionary choses in action.⁴

tainly prevailed, that a distinction subsists between an assignment by operation of law, and an assignment for a valuable consideration, to an individual by contract; that the former is no bar to the right of the surviving wife, but that the latter is. And I think both kinds of assignment ought to have the same effect; and that it would be a manifest inconsistency to decide the contrary." See, also, *Ibid.* p. 53, and *Pierce v. Thornley*, 2 Sim. R. 167. But in the cases of *Elliot v. Cordell*, 5 Madd. R. 149, and *Stanton v. Hall*, 2 Russ. & Mylne, 355, cited *Ante*, § 1408, the distinction is insisted on.

¹ *Ibid.*

² *Clancy on Married Women*, B. 5, ch. 4, p. 494; *Elliot v. Cordell*, 5 Madd. R. 149; *Ante*, § 1408; *Stanton v. Hall*, 2 Russ. & Mylne, 355; *Purdew v. Jackson*, 1 Russ. 1; *Ibid.* 53. See, also, *Major v. Lansley*, 2 Russ. & Mylne, 359; *Post*, § 1414, note (1).

³ Note, *supra*. See *Crook v. Turpin*, 10 B. Monroe, 243.

⁴ *Elwyn v. Williams*, *The English Jurist*, April 24, 1843, p. 337, 338; *Ellison v. Elwyn*, 13 Simons, R. 309; *Honner v. Morton*, 3 Russell, R. 65; *Purdew v. Jackson*, 1 Russ. R. 70. In this last case, Sir Thomas Plumer said: "After this repeated consideration of the subject, I still continue of opinion, that all the assignments made by the husband of the wife's outstanding personal chattels, which is or cannot then be reduced into possession, whether the assignment be in bankruptcy, or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser for a valuable consideration, pass only the interest which the husband has

§ 1413. In respect to reversionary choses in action,¹ and other reversionary equitable interests of the wife, in personal chattels, (although not, as we have seen, to her immediate and present equitable interests,² in chattels real,) the doctrine has been for a long time well settled, and in a manner most favorable to her rights;³ for no assignment by the husband, even with her consent, and joining in the assignment, will exclude her right of survivorship in such cases. The assignment is not, and cannot from the nature of the thing, amount to a reduction into possession of such reversionary interests; and her consent, during the coverture, to the assignment, is not an act obligatory upon her.⁴ Nay, in such

subject to the wife's legal right by survivorship"; and this doctrine was fully recognized and affirmed in *Ellison v. Elwyn*, 13 Simons, 309, 317.

¹ [It has recently been held that a wife's equity to a settlement did not extend to a reversionary interest in stock. The settlement of that fund cannot be asked for until it falls into possession. *Osborn v. Morgan*, 8 Eng. Law & Eq. R. 192.]

² *Ante*, § 1410.

³ It has been recently held, that the husband may assign his wife's contingent reversionary interest in a term of years, held in trust for her, and oust her of her equity. On that occasion, the Master of the Rolls (Sir John Leach) said: "It is clear, that the wife's contingent legal interest in a term may be sold by her husband; and there is no difference in equity between the legal interest in, and the trust of, a term." *Donne v. Hart*, 2 Russ. & Mylne, R. 360; *Ante*, § 1410. See *Major v. Lansley*, 2 Russ. & Mylne, 355; *Post*, 1413, note (4); *Purdew v. Jackson*, 1 Russ. R. 1; *Ibid.* 50.

⁴ *Hornsby v. Lee*, 2 Madd. R. 16; *Purdew v. Jackson*, 1 Russ. 1, 62, 67, 69, 70; *Morely v. Wright*, 11 Ves. 17; *Elliot v. Cordell*, 5 Madd. R. 149; *Honner v. Morton*, 3 Russ. R. 65, 88; *Stamper v. Barker*, 5 Madd. R. 157; *Mitford v. Mitford*, 9 Ves. 87; *Stanton v. Hall*, 2 Russ. & Mylne, R. 175; *Stiffe v. Everitt*, 1 Mylne & Craig, 37, 41. This last case first came on before Sir C. C. Pepys, when Master of the Rolls. It was a case where a testator had given his residuary estate to trustees for the separate use of his daughter, then unmarried, for life, without power of anticipation. She afterwards married, and joined with her husband in a petition to have the fund transferred to him absolutely. The court refused it. The Master of the Rolls then said, "That the doubt he felt was one which the authorities cited left quite untouched, namely, how far, where an annuity or life-interest in a fund was given to a married woman, and not settled to her separate use, the husband, with her concurrence, was capable of effectually disposing of her entire life-estate, seeing that she might outlive her husband, and then, as to such part of it as would be enjoyed by her after the coverture determined, her interest would be reversionary only. He should be glad to be furnished with any cases which would relieve him from this difficulty; but, unless some authority for it was produced, he must decline to make the order." Afterwards, when he became Lord Chancellor, he reheard the cause, and said: "When this petition came

a case, the wife's consent in court to the transfer of such reversionary interest to or by her husband, will not be allowed. That consent is not acted upon by the court, except where she is to part with her equity to a settlement, or with her own present and immediate separate property; and is never acted on for the purpose of parting with her reversionary property, or with her right of survivorship.¹ If the assignment could be deemed, on the part of

on to be heard, it was assumed, that the only question was, the authority of some late decisions, with respect to property left to the separate use of a woman not married at the time. But I suggested another difficulty, namely, with respect to the power of the husband to dispose of his wife's life-interest when not settled to her separate use; and the petition stood over for the purpose of enabling the petitioners' counsel to produce cases in favor of such right. I have since been informed, that no such cases are to be found. It is, I believe, certain, that there are none; and the question is, whether consistently with the doctrine established in *Purdew v. Jackson* (1 Russ. 1), and *Honner v. Morton* (3 Russ. 65), any such power can exist. This very point is just alluded to in a note to *Purdew v. Jackson* (1 Russ. 71, note); but there is no decision upon it. I do not see how, consistently with the cases of *Purdew v. Jackson*, and *Honner v. Morton*, the husband can make a title to such of the dividends of the fund as may accrue after his own death, and during the life of his wife surviving him." The case of *Major v. Lansley* (2 Russ. & Mylne, 359) may seem at first view to contradict or to qualify the generality of the doctrine stated in the text. But there were several circumstances in that case materially distinguishing it from the cases referred to in the text. One circumstance was, that, in that case, the annuity (which was assigned by the husband and wife), although a reversionary interest, was devised to the separate use of the wife; and, of course, she had the same complete power to dispose of it, as she had of any other equitable property vested in her for her separate use; and she joined in the assignment of her husband. Another was, that there were no trustees interposed, and the legal interest of the annuity, therefore, devolved upon her husband for the joint lives of himself and the wife, and she had only an equitable interest therein, and the assignment could operate upon that equitable interest. Another was, that the reversionary interest fell into possession before the death of the husband, and he had by the assignment, covenanted, that he and his wife would levy a fine of the annuity; which, however, was not done at the time of his death. The court thought, that, under these circumstances, the legal estate in the annuity, coming to the wife by the death of the husband, did not defeat the title of the assignee to the equitable interest therein under the assignment, as a *bonâ fide* purchase for a valuable consideration.

¹ *Richards v. Chambers*, 10 Ves. 580, 686; *Pickard v. Roberts*, 3 Madd. R. 386; *Osborn v. Morgan*, 8 Eng. Law & Eq. R. 193; *Macaulay v. Phillips*, 4 Ves. 18; 1 *Roper on Husb. and Wife*, ch. 6, § 2, p. 246 to 248; 2 *Roper on Husb. and Wife*, ch. 19, § 2, p. 184; *Id.* ch. 20, § 2, p. 222; *Woollands v. Crowcher*, 12 Ves. 174, 177; *Sturgis v. Corp*, 13 Ves. 191, 192; *Honner v. Morton*, 3 Russ. R. 64, 86, 87; *Major v. Lansley*, 2 Russ. & Mylne, 359. See also *Clancy on Married Women*, B. 5, ch. 8, p. 344 to 346; *Ante*, § 1396, and note.

the husband, to be an agreement to reduce such reversionary interest into possession ; yet, being incapable of being performed, it could not be treated, upon any principle of equity, as if it had been performed.¹ It is this supposed ability of the husband to reduce it into possession, which constitutes the sole ground (if, indeed, that is sufficient) of giving effect to his assignment of an immediate and present equitable interest of the wife against her right of survivorship, in favor of a purchaser for a valuable consideration.²

§ 1414. Thirdly. The equity of a wife to a settlement will not only be enforced, in regard to her choses in action and equitable interests under the circumstances above mentioned, against the husband and his assignees, where he or they are plaintiffs, seeking aid and relief in equity ; but it will also be enforced where she or her trustee brings a suit in equity for the purpose of asserting it.³ This was formerly matter of no inconsiderable doubt, as it was (not unnaturally) supposed that the jurisdiction rested solely

¹ This was until lately a matter of controversy, which was acutely and severely debated in the profession. But it is put finally at rest by the decisions in *Purdew v. Jackson*, 1 Russ. R. 1, and *Honner v. Morton*, 3 Russ. R. 65.

² *Ante*, § 1402, 1410. In *Honner v. Morton* (3 Russ. 75), Lord Chancellor Lyndhurst said : " This fund was a chose in action of the wife ; it was her reversionary chose in action. Whether the husband has the power of assigning his wife's reversionary interest in a chose in action is a question which has been repeatedly agitated, and has excited considerable interest, both at law and in equity. At law, the choses in action of the wife belong to the husband, if he reduces them into possession ; if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the chose in action of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor ; and that he, too, must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement, that he will reduce the property into possession. It likewise considers what a party agrees to do, as actually done ; and, therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On the other hand, I should also infer, that, where the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property, till, by subsequent events, he comes into the situation of being able to reduce the property into possession ; and then his previous assignment will operate on his actual situation, and the property will be transferred."

³ *Sturgis v. Champneys*, 5 Mylne & Craig, 99 to 107 ; *Hanson v. Keating*, *The Jurist*, 1844, Vol. 8, p. 944. See *Clark v. Cook*, 3 De Gex & Smale, R. 333 ; *Gilchrist v. Cator*, 1 De Gex & Smale, R. 188.

upon the ground that parties seeking relief in equity should do equity; and, if they were not seeking any relief, then, that the court remained passive. But the doctrine is now firmly established, that, whenever the wife is entitled to this equity for a settlement out of her equitable interests against her husband or his assignees, she may assert it in a suit, as plaintiff, by bringing a bill in the name of her next friend.¹ And certainly there is much good sense in disallowing any distinction, founded upon the mere consideration, who is plaintiff on the record; for her equity is precisely the same, whether she is plaintiff or defendant. If it is a substantial right, it ought to be enforced in her favor whenever it is withheld from her.²

§ 1415. We have seen, that, when the husband comes into a court of equity for relief, as to any property, which he claims in her right *jure mariti*, he will be obliged to submit to the terms of the court, and make a settlement or provision for her, otherwise the court will not render him any assistance. If he does not choose to make any such settlement or provision, the court will not, ordinarily, take from him the income and interest of his wife's fortune, so long as he is willing to live with her, and maintain her, and there is no reason for their living apart. The most the court will do under such circumstances is, to secure the fund, allowing him, whenever it is deemed proper, under its order to receive the income and interest.³ The effect of this proceeding is, that the wife will have the chance of taking it by survivorship.⁴ But, where the husband refuses her a maintenance, or deserts her, the rule, as we shall presently see, is different.⁵ The like doctrine,

¹ *Ante*, § 1404; *Bosvil v. Brander*, 1 P. Will. 458, and Mr. Cox's note (1); *Clancy on Married Women*, B. 5, ch. 2, p. 471 to 475; 1 *Roper on Husband and Wife*, ch. 7, § 1, p. 260 to 263; *Elibank v. Montelieu*, 5 Ves. 737; *Ellis v. Ellis*, 1 Viner, Suppt. 475; *Gardner v. Walker*, 1 Str. 503; *Harrison v. Buckle*, 1 Str. R. 233; *Roberts v. Roberts*, 2 Cox, R. 422; *Tanfield v. Davenport*, Tothill, R. 119; *Carr v. Taylor*, 10 Ves. 574; *Van Duzer v. Van Duzer*, 6 Paige, R. 366; *Sturgis v. Champneys*, 5 Mylne & Craig, 97, 103, 104.

² See *Gardner v. Walker*, 1 Str. R. 503, 504; *Van Duzer v. Van Duzer*, 6 Paige, R. 366.

³ *Sleech v. Thorington*, 2 Ves. 562; *Watkins v. Watkins*, 2 Atk. 96, 98; *Bond v. Simmons*, 3 Atk. 20; *Packer v. Wyndham*, Prec. Ch. 412; *Macaulay v. Phillips*, 4 Ves. 15; *Murray v. Elibank*, 10 Ves. 90; *Johnson v. Johnson*, 1 Jac. & Walk. 472; 1 *Roper on Husband and Wife*, ch. 7, § 2, p. 276, 277.

⁴ 1 *Fonbl. Eq. B. 1*, ch. 2, § 6, note (k); 1 *Roper on Husband and Wife*, ch. 7, § 2, p. 277, 278.

⁵ *Post*, § 1422 to 1424, 1426.

subject to the like exceptions and limitations, is applied to assignees in bankruptcy, and to other general assignees, claiming title under the husband.¹ We have already seen, that a voluntary postnuptial settlement, made by a husband upon his wife, in consideration of personal property having come to her as distributee or legatee, will be upheld in equity, even against creditors, if it be a reasonable settlement, and such as a court of equity would have enforced, upon a bill brought for the purpose, in favor of the wife.²

§ 1416. Let us pass, in the next place, to the consideration of the circumstances under which this equity to a settlement may be waived or lost. And here, it need scarcely be said, that, if the wife is already amply provided for, under a prior settlement, the very motive and ground for the interference of a court of equity in her favor is removed.³ But she will not, ordinarily, be barred by an inadequate settlement, unless it be by an express contract made before marriage.⁴

§ 1417. The wife's equity for a settlement is generally understood to be strictly personal to her, and it does not extend to her issue, unless it has been asserted and perfected by her in her lifetime. If, therefore, she should die, entitled to any equitable interest, and leave a husband, and her children are unprovided for by any settlement, still her husband will be enabled to file a bill to recover the same, without making any provision for the children.⁵ In truth, the equity of the children is not an equity to which in their own right they are entitled. It cannot, therefore, be asserted against the wishes of the wife, or in opposition to her rights. The court, in making a settlement of the wife's property, always attends to the interests of the children, because it is supposed that in so doing, it is carrying into effect her own desires to

¹ 1 Roper on Husband and Wife, ch. 7, § 2, p. 277. See *Corsbie v. Free*, 1 Craig & Phillips, 64; *Post*, § 1421, 1421 a.

² *Wickes v. Clarke*, 8 Paige, R. 161; *Ante*, § 372, 1377 a.

³ *Clancy on Married Women*, B. 5, ch. 1, p. 441; *Id.* ch. 5, p. 510 to 522; *Martin v. Martin*, 1 Comstock, 473.

⁴ *Ibid.*

⁵ 1 Roper on Husband and Wife, ch. 7, § 1, p. 263; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k); *Clancy on Married Women*, B. 5, ch. 7, p. 532 to 536; *Scriven v. Tapley*, Ambler, R. 509; *S. C.* 2 Eden, R. 337; *Macaulay v. Phillips*, 4 Ves. 18; *Loyd v. Williams*, 1 Madd. R. 467; *Johnson v. Johnson*, 1 Jac. & Walk. 479; *Harper v. Ravenhill*, Tamlyn, R. 144; *Murray v. Elibank*, 10 Ves. 84, 88, 89; *S. C.* 13 Ves. 1, 8.

provide for her offspring. But, if she dissents, the court withholds all rights from the children.¹ But the right of the children to the benefit of a settlement attaches upon the wife's filing a bill for that purpose; and if she should die, pending the proceedings, without waiving the right to a settlement, the children may, by a supplemental bill, enforce their claim.²

§ 1418. It is competent, however, for the wife at any time pending the proceedings, and before a settlement under the decree is completed, or at least before proposals are made under that decree, by her consent, given in open court or under a commission, to waive a settlement, and to agree that the equitable fund shall be wholly and absolutely paid over to her husband.³ In such an

¹ *Hodgens v. Hodgens*, 11 Bligh, R. 104 to 106. On this occasion, Lord Cottenham said: "The equity of the children is not an equity to which they are in their own right entitled. In making the settlement of the wife's property, the interests of the children are always attended to, because it must be supposed to be the object, and it is the duty of the court, in carrying that object into effect, to provide for those whom the mother of the children would be anxious to provide for; but, as between the mother and the children, I know of no authority for saying that the court has jurisdiction to take from the mother that which the court has given to the mother, as against the right of the husband, for the purpose of creating a benefit to the children. That the children have no equity of their own; that it is only the equity that they obtain through the means of the consent of the mother, is sufficiently clear, when I call to your lordships' recollection the fact that, if the mother, having attained the age of twenty-one, comes into court, and consents that the property shall be paid over to the husband, the court will permit it to be paid over, without reference to the interests of the children. But in no instance are the children permitted to assert an independent equity of their own; and in no instance has that right ever been permitted against the mother. It is against the father that the court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him; and then the court deals with those rights as between the mother, whose property it is, and as between the children of the marriage, in such a way as may be thought for the interests of the family. But the question is, whether the children have any right of their own against their mother, to deprive her of that income, which is given to her by a settlement, though not actually executed, yet in the hands of the master at the time when the party thought proper to submit to the jurisdiction of the court." See *Fenner v. Taylor*, 1 Sim. 169; *Lloyd v. Mason*, 5 Hare, 149.

² *Rowe v. Jackson*, 2 Dick. R. 604; *Murray v. Elibank*, 13 Ves. 1, 8, 9; *Steinmeitz v. Halthyn*, 1 Glyn & Jam. 64; *Clancy on Married Women*, B. 5, ch. 6, p. 527 to 529; *Id.* ch. 8, p. 527 to 544; *Groves v. Perkins*, 6 Sim. R. 576, 584; *Groves v. Clarke*, 1 Keen, R. 138, 139; *In re Walker*, 1 Lloyd & Goold, R. 324, 325; *De La Garde v. Lempriere*, 6 Beavan, R. 344.

³ There are many cases in this point. But it was directly recognized by Lord Chancellor Cottenham, in *Hodgens v. Hodgens*, 11 Bligh, R. 103 to 105, in the

event, both she and her children will be deprived of all right whatsoever in and over the fund.¹ But a female ward of the Court of Chancery, who has been married without its authority, and in contempt of it, will not be allowed by the court to dispense with a settlement out of her property.² On the contrary, the court will insist upon such a settlement being made by the husband, notwithstanding her consent to the contrary. And the court will often, by way of punishment, in gross cases, do what it is not accustomed to do on common occasions, require a settlement of the whole of the wife's property to be made on her and her children.³

§ 1419. The equity of the wife to a settlement may not only be waived by her, but it may also be lost or suspended by her own misconduct. Thus, if the wife should be living in adultery, apart from her husband, a court of equity will not interfere, upon her

House of Lords. As to the mode of her examination, when she does not appear in open court, but it is under a commission, see *Minet v. Hyde*, 2 Bro. Ch. R. 663, and Mr. Belt's note; *Bourdillon v. Adair*, 3 Bro. Ch. R. 237; *Campbell v. French*, 3 Ves. 321; *Clancy on Married Women*, B. 5, ch. 8, p. 539 to 542; *In re. Walker*, 1 Lloyd & Goold, R. 324, 325; *De La Garde v. Lempriere*, 6 Beavan, R. 344.

¹ *Murray v. Elibank*, 10 Ves. 88, 90; S. C. 13 Ves. 1, 5, 6, 8; *Macaulay v. Phillips*, 4 Ves. 18, 19; *Fenner v. Taylor*, 1 Sim. R. 169; S. C. 2 Russ. & Mylne, 190; *Lloyd v. Williams*, 1 Madd. R. 450, 466; *Carter v. Taggart*, 9 Eng. Law & Eq. R. 167; 1 *Roper on Husband and Wife*, ch. 7, § 1, p. 264 to 266; *Hodgens v. Hodgens*, 11 Bligh, R. 103 to 105. But see *Clancy on Married Women*, B. 5, ch. 6, p. 524 to 527; *Id.* 531, where the author is of opinion that the wife, after proposals for a settlement, made by the husband, under a decretal order, cannot waive a settlement, so as to take away the rights of her children, though she may before. See also *Ex parte Gardner*, 2 Ves. 672, and Mr. Belt's note, and his Suppl. p. 438.

² 2 *Roper on Husband and Wife*, ch. 7, § 1, p. 267, 268; *Clancy on Married Women*, B. 5, ch. 6, p. 525; *Id.* ch. 11, p. 579, 580. Upon this point, Lord Cottingham, in *Hodgens v. Hodgens*, 11 Bligh, R. 103, said: "In cases either where the husband has been guilty of contempt in marrying a ward, or where he has not been guilty of such contempt, if a court of equity has jurisdiction over the property of the ward, it undoubtedly, in making settlements, constantly and almost uniformly, I may say, provides for the interest of the children. The case we have now to consider, is, where the husband has been guilty of a gross contempt, and where the settlement to be made and the objects to be provided for by that settlement are to be considered with reference to the situation in which he, the husband, stands as respects himself and the property of the ward, with regard to whom he has been guilty of an offence, by marrying without the consent of the court."

³ *Ibid.*; *Like v. Beresford*, 3 Ves. 506; *Stackpole v. Beaumont*, 3 Ves. 89, 98; *Ball v. Coutts*, 1 Ves. & Beam. 303; *Clancy on Married Women*, B. 5, ch. 1, p. 450 to 454.

own application, to direct a settlement out of her choses in action, or other equitable interests ;¹ for, by such misconduct, she has rendered herself unworthy of the protection and favor of the court.² On the other hand, a court of equity will not, in such a case, upon the application of the husband, decree such equitable property of the wife to be paid over to him ; for he is at no charge for her maintenance ; and it is only in respect to his duty to maintain her, that the law gives him her fortune.³

§ 1419 *a*. Where, indeed, the wife has entitled herself to a settlement, and it has been decreed by a court of equity, there, the court will not withhold or vary her right in consequence of any misconduct on her part, even although the decree has not been carried into execution. Nor will the court in such a case, at the instance of the husband who has misconducted himself, entertain a suit for a settlement against the wife or her children, and thereby relieve him from his ordinary duty of maintaining them.⁴

§ 1420. But we must be careful to distinguish between an application made for a settlement on the wife, which is addressed to the equity of the court, and which is administered by it, *sud sponte*, upon the merits of the parties, and is not founded in any antecedent vested rights, and other applications, where the parties stand upon their own positive vested rights under a settlement, or under a valid contract for a settlement, made before marriage. In the latter cases, courts of equity cannot refuse to protect or support those vested rights, on account of any misconduct in the wife ; and it will be no answer to a suit, brought by her for a settlement in such cases, that she has been guilty of adultery.⁵

¹ But see *Greedy v. Lavender*, 14 Jurist, 608, 13 Beavan, 62.

² 1 Roper on Husb. and Wife, ch. 7, § 1, p. 275 ; *Carr v. Estabrooke*, 4 Ves. 146 ; *Ball v. Montgomery*, 2 Ves. Jr. 197, 199 ; *Martin v. Martin*, 1 Comstock, 473 ; *Sidney v. Sidney*, 3 P. Will. 269. But if the wife be a ward of the Court of Chancery, and married without its consent, there, although she is living in adultery, the court will insist on a settlement for a contempt of its authority. *Ball v. Coutts*, 1 Ves. & Beam. 302, 304 ; 1 Roper on Husband and Wife, ch. 7, § 2, p. 276 ; *Clancy on Married Women*, B. 5, ch. 11, p. 586 to 588. And in case of a jointure, or articles for a jointure before marriage, the right to the settlement is not forfeited by the adultery of the wife. *Sidney v. Sidney*, 3 P. Will. 269.

³ *Ibid*.

⁴ *Hodgens v. Hodgens*, 11 Bligh, R. 62, p. 104 to 110.

⁵ 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (k) ; *Clancy on Married Women*, B. 5, ch. 11, p. 588 ; *Sidney v. Sidney*, 3 P. Will. 269, 276, and Mr. Cox's note (2) ; *In re Walker*, 1 Lloyd and Goold, R. 326, 327. [But it seems that a covenant before

§ 1421. Let us, in the next place, consider under what circumstances courts of equity will allow alimony to a married woman. The wife's equity already mentioned, as it is ordinarily administered against her husband, or against his particular assignee, for a valuable consideration, is by decreeing a settlement, which secures to her a provision for her maintenance, commencing from the death of her husband.¹ When the same equity is administered upon a general assignment of his property in bankruptcy, or otherwise, the settlement secures a present and immediate provision for the maintenance of the wife; because the general assignment of his property renders him incapable of giving her a suitable support.² In each case, the equity is administered out of the equitable funds, which are brought under the control of the court, and are subject to its order. The object of the court, in each case, is to secure to her a maintenance out of such equitable funds, whenever she stands in need of it.

§ 1421 *a.* So, if it is apparent from the state of the case, that the husband must remain in future without funds to maintain his wife, and there is an equitable fund belonging to her, within the reach of a court of equity, it will decree the income of the whole fund, to be applied, primarily, to the maintenance of the wife during her lifetime, and, after her death, the principal to be divided among her children. Thus, if the husband has become insolvent, and has taken advantage of an insolvent act, which discharges his person, but not his future effects, there, a court of equity will secure the whole fund, in the manner above mentioned, for the benefit of the wife and children; for it is apparent, that there is no certainty that he can ever have any means of supporting his wife and children. In this respect, the case differs from that of a discharge under the bankrupt laws; for, in the latter case, the future effects of the bankrupt are not liable to his creditors. It is upon this difference, that courts of equity will not give the whole fund to the wife and children in cases of bankruptcy,³ as they will in cases of insolvency.⁴

marriage, that in case of *any* separation taking place between the husband and wife, the husband shall make a certain provision for his wife, is void; as it may be an inducement to the wife to be guilty of the worse conduct. *Cocksedge v. Cocksedge*, 14 Simons, R. 244.]

¹ Clancy on Married Women, B. 5, ch. 9, p. 549.

² *Ibid.*

³ See *Vaughan v. Buck*, 1 Simons, N. S. 284; 3 Eng. Law & Eq. R. 135.

⁴ See *Brett v. Greenwell*, 3 Younge & Coll. 230 to 232; *Beresford v. Hobson*,

[* § 1421 *b*. Where property was settled on the wife for her separate use for life, and after the death of herself and husband, upon certain trusts for their children ; she having become lunatic, it was decreed that the income should be paid to the husband, he undertaking to apply it for the support of the wife and children.¹]

§ 1422. But it is obvious that cases may arise calling for relief in favor of the wife, under very different circumstances from those above stated. Thus, a woman may be totally abandoned and deserted by her husband ; or she may be driven from his home, and compelled by his ill-treatment and cruelty to seek an asylum elsewhere. The question, therefore, may arise, whether, under such circumstances, courts of equity have a general authority to decree alimony to the wife, when she is left without any other adequate means of maintenance. To this question, propounded in its general form, it can scarcely be said, that, according to the result of the authorities, an answer in the affirmative can be given in positive terms. Although it is clearly the duty of the husband to provide a suitable maintenance for his wife, if it is within his power ; yet according to the course of the English authorities, it seems not to be an obligation or duty, of which courts of equity will decree the specific performance, by directing in such a case a separate maintenance.² The proper remedy is by an action in a court of common law, to be brought against the husband by any person who shall, under such circumstances, supply the wife with necessaries according to her rank and condition ; for, by compelling the wife thus to leave him, the husband sends her abroad with

¹ Madd. R. 362 ; *Scott v. Spashett*, 9 Eng. Law & Eq. R. 265. [This was done in *Gardner v. Marshall*, 14 Simons, R. 575, although the husband was a bankrupt.] In *Foden v. Finney*, 4 Russ. R. 428, the whole fund in the court being less than £ 200 (which is the lowest sum for which the court gives the wife the benefit of her equity), the court ordered the whole to be paid over to the husband, notwithstanding he had deserted her and left her without support for ten years. This case seems difficult to be maintained on principle. [In *Cutler's Trust, in re*, 15 (English) Jurist, 911 ; 6 Eng. Law & Eq. R. 97, the Master of the Rolls (Sir John Romilly) disapproved of this case.]

¹ [* In the Matter of *Ellen Spiller*, 6 Jur. N. S. 386.]

² *Ball v. Montgomery*, 2 Ves. 195, 196 ; *Head v. Head*, 3 Atk. 550 ; *Legard v. Johnson*, 3 Ves. 359 to 361 ; *Clancy on Married Women*, B. 5, ch. 9, p. 549, 550. See also *Foden v. Finney*, 4 Russ. 428, and *Ante*, § 1422 *a*, note ; *Post*, § 1472 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n).

a general credit for her maintenance.¹ Or, if this reliance should be precarious, the wife may make an application to the proper ecclesiastical court for a decree *a mensâ et thoro*, or for a restitution of conjugal rights; and, as incident thereto, (but not, as it seems, as an exercise of original jurisdiction,) the latter court may pronounce a decree for a suitable alimony.²

§ 1423. It has, indeed, been said, that, upon a writ of *supplicavit* in chancery, by the wife, for security of the peace against her husband, the court may, as an incident to the exercise of that jurisdiction, decree a separate maintenance to her.³ But it has been also said, that there is no modern instance of any such exercise of authority.⁴

§ 1423 *a*. In America, a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held, that if a husband abandons his wife and separates himself from her without any reasonable support, a court of equity may, in all cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted.⁵

§ 1424. But, although courts of equity do not assert any general jurisdiction to decree a suitable maintenance for the wife out of her husband's property, because he has deserted her or ill-treated her,⁶ yet, on the other hand, they do not abstain altogether

¹ *Guy v. Pearkes*, 18 Ves. 196, 197; *Harris v. Morris*, 4 Esp. R. 41; *Hodges v. Hodges*, 1 Esp. R. 441; *Bolton v. Prentice*, 2 Str. R. 1214; *Hindley v. Marquis of Westmeath*, 6 B. & Cres. 200, 213.

² *Ball v. Montgomery*, 2 Ves. 195; *Clancy on Married Women*, B. 5, ch. 9, p. 549, 550; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (2).

³ *Ball v. Montgomery*, 2 Ves. 195; *Duncan v. Duncan*, 19 Ves. 394; *Lambert v. Lambert*, 2 Bro. Parl. R. 18, by Tomlins; but counsel, *arguendo*, p. 283. See, for the form of a *supplicavit*, *Clancy on Married Women*, B. 5, ch. 1, p. 454; *Fitz. Nat. Brev.* 238, 239; *Gilb. Forum Roman.* ch. 11, p. 202; *In re Ann Walker*, 1 Lloyd & Goold, R. 326, 327.

⁴ 2 *Roper on Husb. and Wife*, ch. 22, § 4, p. 309, note; *Id.* § 5, p. 317 to 320; *Clancy on Married Women*, B. 5, ch. 1, p. 453 to 455.

⁵ *Purcell v. Purcell*, 4 Hen. & Munf. 597. [And see *Patterson v. Patterson*, 1 Halsted, Ch. R. 389. A claim for alimony ceases on the death of the husband. *Gaines v. Gaines*, 9 B. Monroe, 245.]

⁶ During the time of the Commonwealth in England, there was a suspension of all ecclesiastical tribunals, and their powers were conferred on the commission-

from interference in her favor.¹ Whenever the wife has any equitable property, within the reach of the jurisdiction of courts of equity, they will lay hold of it; and, in the case of the desertion or ill-treatment of the wife by the husband, as well as in the case of his inability or refusal to maintain her, they will decree her a suitable maintenance out of such equitable funds.² The general ground on which this jurisdiction is asserted is, that the law, when it gives the property of the wife to the husband, imposes upon him the corresponding obligation of maintaining her; and that obligation will fasten itself upon such equitable property, in the nature of a lien or trust, which courts of equity, when necessary, will, in pursuance of their duty, enforce. If the equitable property has been fraudulently transferred into the possession of the husband, or of a third person for his use, the same equity will be enforced against it in their hands; and if it has passed into the possession of a *bonâ fide* purchaser without notice, the other property of the husband will be held liable as a substitute.³

§ 1425. Courts of equity will also, for the like reasons, interfere, and decree a suitable maintenance to the wife, under the like circumstances, whenever there is a positive agreement between the parties for the purpose, or whenever there has been a decree for

ers of the great seal, who then exercised the authority to decree alimony, according to the doctrines of the ecclesiastical law. See *Russell v. Bodvil*, 1 Ch. Rep. 186; *Whorewood v. Whorewood*, 1 Ch. Cas. 250; *Finch*, Ch. R. 153; 1 Ch. Rep. 223. See also *Clancy on Married Women*, B. 6, ch. 9, p. 550; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); *Head v. Head*, 3 Atk. 295; *Legard v. Johnson*, 3 Ves. 359, 360.

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); *Clancy on Married Women*, B. 6, ch. 9, p. 549 to 567; *Head v. Head*, 3 Atk. 295, 548.

² *Nicols v. Danvers*, 2 Vern. 671, and Mr. Raithby's notes; *Oxenden v. Oxenden*, 2 Vern. 493; S. C. Prec. in Ch. 239; *Williams v. Callow*, 2 Vern. 752; *Lambert v. Lambert*, 2 Bro. Parl. R. 18, by Tomlins; *Wright v. Morley*, 11 Ves. 20, 21, 23; *Bullock v. Menzies*, 4 Ves. 798, 799; *Duncan v. Duncan*, 19 Ves. 394, 396, 397; *Sleece v. Thorington*, 2 Ves. 561; 1 Roper on Husb. and Wife, ch. 7, § 2, p. 276 to 287; *Burdon v. Dean*, 2 Ves. Jr. 607; *Atherton v. Nowell*, 1 Cox, R. 229; *Clancy on Marr. Women*, B. 5, ch. 9, p. 549 to 567; *Elliot v. Cordell*, 5 Madd. 156; *Peters v. Grote*, 7 Sim. R. 238; [*Gilchrist v. Cator*, 1 De Gex and Smale, R. 188; *Edwards v. Abrey*, 2 Phillips, Ch. R. 37. In the latter case, the surplus income of the wife's separate property, after providing for her maintenance, was paid to the husband; but the court refused to apply any part of the principal fund to reimburse the husband what he had actually paid for her past maintenance.]

³ *Colmer v. Colmer*, Mosel, R. 113; *Watkyns v. Watkyns*, 2 Atk. 96; *Clancy on Marr. Women*, B. 5, ch. 9, p. 562 to 566.

alimony upon proceedings in the ecclesiastical courts.¹ In the former case no more is done than in other cases of contract between parties, to enforce their mutual obligations by a specific performance.² In the latter case, it would seem to be but the ordinary equity of carrying into effect the decree of a competent court against the property of a party, who seeks by fraud or otherwise to evade it.³ However, it has been recently held in England, that no bill ought to be maintained in equity to enforce any decree for alimony in the Ecclesiastical Court, after the death of the wife. The reason is suggested to be, that alimony is the proper and exclusive subject for discussion in the Ecclesiastical Court, whose province it is to determine what ought to be the amount, for how long it is to be granted, and what operates to discharge it.⁴

¹ 1 Roper on Husband and Wife, ch. 7, § 2, p. 278, note (a); *Angier v. Angier*, Prec. Ch. 497, 498; *Post*, § 1472; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n).

² 1 Fonbl. Eq. B. 1, ch. 7, § 6, note (n. 2); *Angier v. Angier*, Prec. Ch. 496; *Lasbrook v. Tyler*, 1 Ch. R. 44; *Head v. Head*, 3 Atk. 547, 548; *Watkins v. Watkins*, 2 Atk. 96; *Oxenden v. Oxenden*, 2 Vern. 493; S. C. Prec. Ch. 239; *Fletcher v. Fletcher*, 2 Cox, R. 99, 102, 104; *Legard v. Johnson*, 3 Ves. 359 to 361. [See *Wilson v. Wilson*, 14 Sim. R. 405, reviewing the cases in which articles of separation have been decreed to be specifically performed.]

³ See *Mildmay v. Mildmay*, 1 Vern. 53, 54; *Whorewood v. Whorewood*, 1 Ch. Cas. 250; *Fletcher v. Fletcher*, 2 Cox, R. 107; *Colmer v. Colmer*, Mosel, R. 121; 1 Roper on Husband and Wife, ch. 7, § 2, p. 278, note (a); 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n. 2); *Head v. Head*, 3 Atk. 295; *Denton v. Denton*, 1 Johns. Ch. R. 364; *Read v. Read*, 1 Ch. Cas. 115; *Ex parte Whitmore*, 1 Dick. R. 143. The question arose in *Stones v. Cooke*, 7 Sim. R. 22, whether a bill is maintainable in equity by the executors of the wife against her husband, for an account and arrears of alimony decreed by an ecclesiastical court, which remained unpaid at the time of her death. The point was left undecided by the Vice-Chancellor. It was suggested that the Ecclesiastical Court might enforce the payment in such a case; and, if so, that would show that the courts of equity need not interfere. But this was thought by the court doubtful, and therefore the bill was retained for a hearing. But the Lord Chancellor (Lord Lyndhurst) reversed the decree, and dismissed the bill. *Stones v. Cooke*, 8 Sim. R. 321, note. In *Earl Digby v. Howard* (4 Sim. R. 588), it was held by this Vice-Chancellor, where the Duchess of Norfolk was entitled to pin-money, and became lunatic, and remained so until her death, and the Duke received all the rents and maintained her during her life, that the Duke was liable in equity for all the arrears, as she was incapable of consent. But the decision was reversed in the House of Lords. *Howard v. Digby*, 8 Bligh, R. 224 (N. S.); S. C. 5 Sim. R. 330; *Ante*, § 1375 a, 1396.

⁴ *Stones v. Cooke*, 8 Sim. 321, note. On this occasion, Lord Lyndhurst is reported to have said: "Alimony is the proper and exclusive subject for discussion in the Ecclesiastical Court. It is the province of that court to determine what

§ 1426. This equity of a wife to a maintenance, out of her own equitable estate, is generally confined to cases of the nature above mentioned, that is to say, where the husband abandons or deserts her; or where he refuses to maintain her; or where, by reason of his insolvency, he is incapable of affording a suitable maintenance for her. Unless some one of these ingredients exists, courts of equity will decline to interfere. If, therefore, the separation of the wife from her husband is voluntary on her part, and is caused by no cruelty or ill treatment; or if he is *bonâ fide* ready and willing and able to maintain her, and she, without good cause, chooses to remain separate from him; or if she already has a competent maintenance;¹ in all such cases, courts of equity will afford her no aid whatever in accomplishing a purpose, which is deemed subversive of the true policy of the matrimonial law, and destructive of the best interests of society.² *A fortiori*, where the wife

ought to be its amount, for how long it is to be granted, and what operates to discharge it. There is no instance in modern times of such a bill as the present being filed. During the rebellion, bills were filed for alimony; but they were filed in consequence of the abolition of the ecclesiastical courts. The decisions during that period do not apply, as they proceed upon the peculiar state of circumstances then existing. Other cases, where maintenance has been allowed to the wife, were cited, but neither do they apply, as they were cases arising out of the fraudulent conduct of the husband, or they were cases of trust. The simple question is, whether, where the alimony has been suffered to run in arrear, a bill can be maintained by the executors of a wife against the husband. It was said, that, in analogy to the cases in which this court grants the writ of *ne exeat regno*, and on principle, the bill might be sustained; but it is impossible to look into those cases without seeing how very reluctantly the court has acted in giving relief. See *Shaftoe v. Shaftoe*, and *Dawson v. Dawson*. Then it was said, that the party will be without remedy, because executors cannot maintain a suit in the Ecclesiastical Court. That argument operates, I think, the other way, for executors may maintain suits in the Ecclesiastical Court, but not for arrears of alimony. It should seem, therefore, that the claim must cease with the death of the wife. That is probably the principle; but it does not follow, that, therefore, this court has jurisdiction. There is no instance of such a bill as the present being filed against the husband by the executors of the wife; and I should be very averse to establish such a precedent. The authorities do not warrant it. The cases in which the court has granted the writ of *ne exeat regno* do not warrant it, nor from the circumstance of the Ecclesiastical Court not interfering, can I find any jurisdiction in this court." See also *Vandergucht v. De Blaquiére*, 8 Sim. R. 315, 322; *Post*, § 1472.

¹ *Holmes v. Holmes*, 4 Barbour, 295.

² Clancy on Marr. Women, B. 5, ch. 9, p. 560, 561; *Id.* ch. 10, p. 572, 573; 2 Roper on Husband and Wife, ch. 22, § 5, p. 313 to 322; 1 Roper on Husband and

has eloped, and is living in a state of adultery, they will withhold all countenance to such grossly immoral conduct; and they will leave the wife to bear, as she may, the ordinary results of her own infamous abandonment of duty.¹

§ 1427. So earnest, indeed, are courts of equity to promote the reconciliation of parties living in a state of separation, that they will, on no occasion whatever, enforce articles of separation by decreeing a continuance of the separation.² It has, indeed, been often questioned, whether deeds of separation between husband and wife, through the intervention of trustees, ought not to be held utterly void to all intents and purposes, as against the policy of the law, not only in their direct provisions for the separation, but also in respect to all collateral and accessorial provisions, such as a stipulation for a separate maintenance.³ But the authorities on

Wife, ch. 7, § 2, p. 281 to 283; *Duncan v. Duncan*, 19 Ves. 394; *S. C. Cooper*, Eq. R. 224; *Bullock v. Menzies*, 4 Ves. 798; *Macaulay v. Philips*, 4 Ves. 19, 20; *Watkins v. Watkins*, 2 Atk. 97.

¹ *Watkins v. Watkins*, 2 Atk. 96; *Ball v. Montgomery*, 2 Ves. Jr. 191, 198, 199; *Carr v. Estabrooke*, 4 Ves. 146; *Clancy on Marr. Women*, B. 5, ch. 10, p. 568, 569.

² *Wilkes v. Wilkes*, 2 Dick. R. 791; *Worrall v. Jacob*, 3 Meriv. 267; *Westmeath v. Westmeath*, Jac. R. 126; *S. C. 1 Dow*, R. 519 (N. S.); *St. John v. St. John*, 11 Ves. 529; *The People v. Mercein*, 8 Paige, R. 47, 57; *Frampton v. Frampton*, 4 Beavan, 287, 293.

³ See *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.), 356; *S. C. 1 Dow & Clarke*, R. 519; *Wilson v. Wilson*, 1 House of Lords' Cases, 538; *Evans v. Evans*, 1 Hagg. Consist. R. 36. On this occasion, Lord Stowell said: "The law has said, that married persons shall not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves; and it is my duty to see whether those reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge, but if it were, it would not be difficult to show, that the law, in this respect, has acted with its usual wisdom and humanity, with that true wisdom and that real humanity that regards the general interests of mankind. For though, in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons, known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that, upon mutual disgust, married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order

this subject have, perhaps, gone too far to enable courts of equity to adopt this broad principle, even if it were as unquestionable and salutary in morals and policy as it has been thought to be.¹

§ 1428. The principal distinctions on this subject, as they are now established, seem to be as follows. In the first place, a deed of separation does not relieve the wife from any of the ordinary

of civil society, might have been, at this moment, living in a state of mutual unkindness, — in a state of estrangement from their common offspring, — and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.”

¹ *St. John v. St. John*, 11 Ves. 529; *Westmeath v. Westmeath*, Jacob, R. 134 to 143; Newl. on Contr. ch. 6, p. 115 to 121; *Worrall v. Jacob*, 3 Meriv. 267; *Id.* 259, note (g). See 2 Roper on Husb. and Wife, ch. 22, § 1, p. 270, note (b); Clancy on Married Women, B. 4, ch. 4, p. 397 to 421; *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.), 339, 354; *Hutton v. Duey*, 3 Barr, 100; *Joddrell v. Joddrell*, 9 Beavan, R. 45. Mr. Roper, in his learned note (2 Roper on Husband and Wife, ch. 22, § 1, p. 270 to 277), has summed up the general reasoning on each side of this point with great ability and clearness. I have drawn the distinctions in the text principally from his labors and those of Mr. Clancy. Clancy on Married Women, B. 4, ch. 4, p. 397 to 421. See also *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.), 339, where this subject is elaborately discussed. Lord Eldon, in delivering his opinion in this case, expressed his disapprobation of the doctrine in the following terms (p. 398, 399): “According to the law of this country, marriage is an indissoluble contract. It can only be dissolved a *vinculo matrimonii* by the legislature; and that contract, once entered into, imposes upon the husband and wife, both with respect to themselves and with respect to their offspring, most important and most sacred duties; so important and so sacred that it does seem a little astonishing that it ever should have happened that it should be thought that they could, by a mutual agreement between themselves, destroy all the duties they owed to each other, and all the duties they owed to their offspring. I do not go through what has been stated in a great variety of cases upon the subject, nor do I refer to them for any other purpose than that of stating that which I think can admit of no contradiction, that it is impossible for any person to read the judgments I have had the honor to pronounce upon the subject, without seeing that I never could originally have been a party to any such doctrine. But, when decision follows decision, when men, whose professional knowledge, whose talents and whose abilities I was bound not only to respect but to revere, had so often, in courts of law, stated doctrines to which I could not agree, it seemed to me a most improper thing that I should take upon myself to say that those doctrines were wrong, without putting the matter into the most solemn course of inquiry; and I believe it will be found, if your lordships look at the judgments to which I am referring, that I was always exceedingly anxious that a case of this important nature should be brought before the House of Lords.” See also *The People v. Mercein*, 8 Paige, R. 47, 67; *S. C.* 3 Hill, R. 399.

disabilities of coverture.¹ In the next place, a deed of separation, entered into by the husband and wife alone, without the intervention of trustees, is utterly void.² In the next place, a deed for an immediate separation, with the intervention of trustees, will not be enforced so far as it regards any covenant for separation; but only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor.³ In the next place, if a deed of separation contains a covenant, purporting to preclude the parties from any future suit for the restitution of conjugal rights, the covenant will be utterly void.⁴ In the next place, a deed, containing a covenant with trustees for a future separation of the husband and wife, and for her maintenance consequent thereon, will be utterly void.⁵ In the

¹ *Marshall v. Rutton*, 8 T. R. 545.

² *Legard v. Johnson*, 3 Ves. 352, 359, 361; *Westmeath v. Salisbury*, 5 Bligh (N. S.), 375; *Carter v. Carter*, 14 Smedes & Marshall, 59.

³ *Legard v. Johnson*, 3 Ves. 359, 360; 2 Roper on Husb. and Wife, ch. 22, § 2, p. 270, and note; *Id.* 287; *Westmeath v. Westmeath*, Jacob, R. 126; *Worrall v. Jacob*, 3 Meriv. 267; *Jee v. Thurlow*, 2 B. & Cressw. 547; *Elworthy v. Bird*, 2 Sim. & Stu. 372; *Rodney v. Chambers*, 2 East, R. 283; *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.), 339, 375. A covenant on the part of the trustees to indemnify the husband against the maintenance of the wife, will be a legal foundation for a covenant on his part to furnish a specific maintenance for her, when there is a general trust-deed between the parties. *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.), 375; *Id.* 356. The subject of the legality of deeds of separation between husband and wife was much discussed in the very recent case of *Jones v. Waite*, 5 Bing. New Cas. 341, in the Exchequer Chamber, where it was held, by three judges against two, that, a deed of separation having been drawn up between husband and wife, a promise by a third person to pay certain debts and expenses, for which the husband was solely liable, if he could execute the deed of separation, was held to be a valid promise. Lords Abinger and Denman being against the decision, and Patterson, Alderson, and Littledale, justices, being in favor of it, Lord Denman, on this occasion, said: "If I could venture to lay down any principle, which alone seems safely deducible from all these cases (which he cited), it is this: That, when a husband has, by his deed, acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation, on being relieved from liability for her debts, he shall not be allowed to impeach the validity of that covenant." The whole case deserves deliberate examination, and it was argued with great ability and learning. See also *Hindley v. The Marquis of Westmeath*, 6 Barn. & Cressw. 200.

⁴ *Ibid.*

⁵ *Durant v. Titley*, 7 Price, R. 577; *Hindley v. Westmeath*, 6 B. & Cressw. 200; *Westmeath v. Salisbury*, 5 Bligh, R. (N. S.), 339, 367, 373, 375, 393, 395, 396, 400, 415 to 417; *St. John v. St. John*, 11 Ves. 526.

next place, even in case of a deed for an immediate separation, if the parties come together again, there is an end to it with respect to any future, as well as to the past separation.¹

[§ 1428 *a*. A court of equity, however, has no control over husband and wife, except with reference to property ; unless there is sufficient cause for separation or divorce. Chancery cannot compel cohabitation, or a restoration of conjugal rights.² This must be left entirely to the Ecclesiastical Court.³ Courts of common law have no power to award a writ of *habeas corpus* on behalf of a husband against his wife who has voluntarily separated from him.⁴]

[* § 1429. From a survey of the doctrines of equity, as illustrated in their application to the relation of husband and wife, it is difficult to resist the conclusion that they are founded in wisdom, in sound morals, and in a delicate adaptation to the exigencies of advanced civilization ; and that, in their practical application, they have tended rather to cement than to weaken the bonds of social and domestic life.]

¹ Fletcher v. Fletcher, 2 Cox, R. 99 ; 3 Bro. Ch. R. 619 ; Bateman v. Countess of Ross, 1 Dow, R. 235 ; Westmeath v. Salisbury, 5 Bligh, R. (N. S.), 375, 395 ; St. John v. St. John, 11 Ves. 537 ; 2 Roper on Husband and Wife, ch. 22, § 1, p. 273, note ; Id. § 5, p. 316 ; Clancy on Married Women, B. 4, ch. 4, p. 405, 413 to 417 ; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*. 2). Whether a covenant for a separate maintenance would now be enforced against the husband, in case of an immediate separation, after the husband was willing to receive his wife again, and cohabit with her, and there was no reason to suppose it to be otherwise than a *bonâ fide* effort at reconciliation, is, perhaps, questionable. See, on this point, the authorities collected and commented on by Mr. Clancy. (Clancy on Marr. Women, B. 4, ch. 4, p. 405 to 420.) Mr. Clancy thinks, that, where the separation is intended to be temporary, it would not be enforced ; where it is intended to be permanent, it would. See also 2 Roper on Husband and Wife, ch. 22, § 5, p. 313 to 316 ; Id. 320 to 322. But see the judgment in Westmeath v. Salisbury, 5 Bligh, R. (N. S.), 339 to 421.

² Cruger v. Douglas, 4 Edw. Ch. R. 433.

³ See Connelly v. Connelly, 2 Eng. Law & Eq. R. 570.

⁴ Sandilands, *ex parte*, 12 Eng. Law & Eq. R. 463.

CHAPTER XXXVIII.

SET-OFF.

[*§ 1430, 1431. Set-off as matter of equitable jurisdiction.

§ 1432. The subject affected by statutes.

§ 1433. Lord Mansfield's exposition of the subject.

§ 1434. Equity decrees set-off under peculiar circumstances.

§ 1435. Will do it where credit is given in faith of it.

§ 1436. Must be special grounds for equitable set-off.

§ 1436 *a*. As where the debts are mutual, and one merely equitable.

§ 1437. Will not set off debts not mutual unless special equity.

§ 1437 *a*, 1437 *b*. Further illustrations of the subject.

§ 1438. Compensation in the civil law.

§ 1439. Was regarded as resting upon natural equity.

§ 1440. Counter-claim extinguished in civil law.

§ 1441. In civil law claims for specific articles set off.

§ 1442. Rights of sureties to set-off, in civil law.

§ 1443. Debts assigned set off in civil law.

§ 1444. Regret that courts of equity have not adopted these maxims.]

§ 1430. IN regard to the following subjects, which are either of unfrequent occurrence or else are partially discussed in the preceding chapters, we must be brief.

§ 1431. And, in the first place, let us consider the subject of SET-OFF, as an original source of equity jurisdiction.¹ It is not easy to ascertain the true nature and extent of this jurisdiction, since it has been materially affected in its practical application in England, by the statutes of 2 George II. ch. 22, and 8 George II. ch. 24, in regard to set-off at law, in cases of mutual unconnected debts;² and by the more enlarged operation of the bankrupt laws, in regard to set-off, both at law and in equity, in cases of mutual debts and mutual credits.³

§ 1432. It was said, by a late learned chancellor, that before the statutes of set-off at law, and the statutes of mutual debts and credits in bankruptcy, "this court (that is, the Court of Chancery as a court of equity) was in possession of it (i. e. the doctrine of

¹ Set-off was formerly called Stoppage. See *Downam v. Matthews*, Prec. Ch. 582; *Jeffs v. Wood*, 2 P. Will. 128, 129.

² See Bac. Abr. by Guillim, title *Set-off*, A. B. C.

³ See stat. 4 & 5 Anne, ch. 17; 5 Geo. I. ch. 11; 5 Geo. II. ch. 30; 46 Geo. III. ch. 135; 6 Geo. IV. ch. 16; *Babbington on Set-off*, ch. 5, p. 116, &c.

set-off), as grounded upon principles of equity, long before the law interfered. It is true, where the court does not find a natural equity, going beyond the statute (of set-off), the construction is the same in equity as at law. But that does not affect the general doctrine upon natural equity. So, as to mutual debts and credits, courts of equity must make the same construction as the law. But, both in law and in equity, that statute, enabling a party to prove the balance of the account, upon mutual credit, has gone much farther than the party could have gone before, either in law or in equity, as to set-off.”¹ This is not a very instructive account of the doctrine; for it leaves in utter obscurity what were the particular cases in which courts of equity did interpose upon principles of natural equity.²

§ 1433. Lord Mansfield has expressed his views of the subject of set-off in equity in the following language: “Natural equity says, that cross-demands should compensate each other, by deducting the less sum from the greater; and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately, in separate actions. It may give light to this case, and the authorities cited, if I trace the law relative to the doing complete justice in the same suit, or turning the defendant round to another suit, which, under various circumstances, may be of no avail. Where the nature of the employment, transaction, or dealings, necessarily constitutes an account, consisting of receipts and payments, debts and credits, it is certain, that only the balance can be the debt; and, by the proper forms of proceeding in courts of law or equity, the balance only can be recovered. After a judgment, or decree “to account,” both parties are equally actors. Where there were mutual debts unconnected, the law said, they should not be set off; but each must sue. And courts of equity followed the same rule, because it was the law; for, had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts; and it was provided for by 4 Anne, ch.

¹ Lord Eldon in *Ex parte Stephens*, 11 Ves. 27; *Green v. Darling*, 5 Mason, R. 207, 208; *Ex parte Blagden*, 19 Ves. 467.

² The general principles of the English law, as to set-off, are well summed up in Mr. Evans's edition of Pothier on Obligations, Vol. 2, p. 112, No. 13.

17, § 11, and 5 George II. ch. 30, § 28. This clause must have, everywhere, the same construction and effect; whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction; and, therefore, if courts differ, one must be wrong. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that Parliament interposed by 2 Geo. II. ch. 22, and 8 Geo. II. ch. 24, § 5. But the provision does not go to goods, or other specific things wrongfully detained. And, therefore, neither courts of law nor equity can make the plaintiff, who sues for such goods, pay first what is due to the defendant; except so far as the goods can be construed a pledge; and then the right of the plaintiff is only to redeem.”¹

§ 1434. If this be a true account of the matter, then it would seem, that courts of equity did not, antecedently to the statutes of set-off, exercise any jurisdiction as to set-off, unless some peculiar equity intervened, independently of the mere fact of mutual, unconnected accounts. As to connected accounts of debt and credit, it is certain, that both at law and in equity, and without any reference to the statutes, or the tribunal in which the cause was depending, the same general principle prevailed, that the balance of the accounts only was recoverable; which was, therefore, a virtual adjustment and set-off between the parties.² But there is some reason to doubt, whether Lord Mansfield’s statement of the jurisdiction of equity in cases of set-off is to be understood in its general latitude, and without some qualifications. It is true that equity generally follows the law, as to set-off; but it is with limitations and restrictions.³ If there is no connection between the demands, then the rule is, as it is at law. But, if there is a connection between the demands, equity acts upon it, and allows a set-off under particular circumstances.⁴

§ 1435. In the first place, it would seem, that, independently

¹ *Green v. Farmer*, 4 Burr. 2220, 2221.

² *Dale v. Sollet*, 4 Burr. 2133.

³ See *Duncan v. Lyon*, 3 Johns. Ch. R. 358, 359; *Dale v. Cooke*, 4 Johns. Ch. R. 11; *Howe v. Sheppard*, 2 Sumner, R. 109, and cases there cited; *Green v. Darling*, 5 Mason, R. 207; *Peters v. Soame*, 2 Vern. R. 428; *Gordon v. Lewis*, 2 Sumner, Rep. 628.

⁴ *Whitaker v. Rush*, Ambler, R. 407, 408, and Mr. Blunt’s note (4); *Hurlbert v. Pacific Insur. Co.* 2 Sumner, R. 471; *Rawson v. Samuel*, 1 Craig & Phillips, 161, 172, 173; *Clark v. Cost*, 1 Craig & Phillips, 54.

of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand, a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it.¹ Thus, for example, if A. should be indebted to B. in the sum of £ 10,000 on bond, and B. should borrow of A. £ 2,000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties, as to the £ 2,000, as an ultimate set-off, *pro tanto*, from the debt of £ 10,000. But if the bonds were both payable at the same time, the presumption of such a mutual credit would be converted almost into an absolute certainty. Now, in such a case, a court of law could not set off these independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what is called a natural equity.² If, in

¹ See *Ex parte Prescott*, 1 Atk. 331. In *Hankey v. Smith* (3 T. R. 507, note), it seems to have been thought by the court, that to constitute mutual credit within the Bankrupt Acts, it is not necessary that the parties mean particularly to trust to each other in each transaction. Therefore, where a bill of exchange, accepted by A., got into the hands of B., and B. bought sugars of A., intending to cover the bill, it was held to be a case of mutual credit, although A. did not know that the bill was in B.'s hands. Lord Kenyon said, the mutual credit was constituted by taking the bill on the one hand and selling the sugars on the other hand; to which Buller, J. assented. The distinction between a mutual debt and a mutual credit is, in this view, extremely nice. In *Trench v. Fenn* (Coke, Bank. Laws, 569, 4th edit.; 544, 5th edit.; S. C. 3 Doug. R. 257), Mr. Justice Buller said: Wherever there is a trust between two men on each side, that makes a mutual credit. In *Olive v. Smith* (5 Taunt. R. 60), Mr. Justice Gibbs said, that Lord Mansfield, in *Trench v. Fenn*, adopted it as a principle, that, wherever there is a mutual trust, that is, wherever one party, being indebted to another, intrusts that other with goods, it is a case of mutual credit. See, also, *Atkinson v. Elliot* (7 T. R. 376); *Olive v. Smith* (5 Taunt. R. 67, 68). In *Key v. Flint* (8 Taunt. R. 23), Mr. Justice Dallas said, that mutual credit meant something different from mutual debts. Mutual credit must mean mutual trust. In *Rose v. Hart* (8 Taunt. R. 499, 506), the court narrowed the extent of former decisions, and held, that, in order to constitute a mutual credit, the demands must be of such a nature as must terminate in cross-debts. See *Easum v. Cato*, 5 B. & Ald. 861.

² Lord Lanesborough *v. Jones*, 1 P. Will. 326; *Ex parte Flint*, 1 Swanst. 33,

such a case, there should be an express agreement to set off the debts against each other, *pro tanto*, there could be no doubt that a court of equity would enforce a specific performance of the agreement, although at the common law, the party might be remediless.¹

§ 1436. In the next place, as to equitable debts, or a legal debt on one side, and an equitable debt on the other, there is great reason to believe, that, whenever there is a mutual credit between the parties, touching such debts, a set-off is, upon that ground alone, maintainable in equity; although the mere existence of mutual debts, without such a mutual credit, might not, even in a case of insolvency, sustain it.² But the mere existence of cross-

34; *Downam v. Matthews*, Prec. Ch. 580, 582. See also a decision of Lord Hale, cited in *Chapman v. Derby*, 1 Vern. R. 117; *Jeffs v. Wood*, 2 P. Will. 128, 129; *Meliorucchi v. Royal Exchange Ass. Co.* 1 Eq. Abr. 8, pl. 8; *S. C. Ambler*, R. 408, note by Mr. Blunt; *James v. Kynnier*, 5 Ves. 110; *Hawkins v. Freeman*, 2 Eq. Abr. 10, pl. 10. In the case of *Lord Lanesborough v. Jones* (1 P. Will. 326), Lord Chancellor Cowper said: "That it was natural justice and equity; that, in all cases of mutual credit, only the balance should be paid." In that case there was a mortgage by A. to B. for £ 1,500, and a debt due by B. to A. on notes for £ 1,400, upon different transactions. In *Jeffs v. Wood* (2 P. Will. 129), the Master of the Rolls said: "But it may be a doubt, whether an insolvent person may, in equity, recover against his debtor, to whom he at the same time owes a greater sum, although I own it is against conscience, that A. should be demanding a debt against B., to whom he is indebted in a larger sum, and would avoid paying it. However, it seems that the least evidence of an agreement for a stoppage will do. And in these cases equity will take hold of a very slight thing, to do both parties right." In *Green v. Darling*, 5 Mason, R. 207 to 213, the principal cases in respect to set-off in equity are collected.

¹ *Jeffs v. Wood*, 2 P. Will. 128, 129; *Whitaker v. Rush*, Ambler, R. 408; *Hawkins v. Freeman*, 2 Eq. Abr. 10, pl. 10.

² See *Lord Lanesborough v. Jones*, 1 P. Will. 326; *Curson v. African Company*, 1 Vern. 122, Mr. Raithby's note; *Jeffs v. Wood*, 2 P. Will. 128, 129; *Ryall v. Rowles*, 1 Ves. 375, 376; *S. C.* 1 Atk. 185; *James v. Kynnier*, 5 Ves. 110; *Gale v. Luttrell*, 1 Y. & Jerv. 180; *Cheetham v. Crook*, 1 McClell. & Y. 307; *Piggott v. Williams*, 6 Madd. 95; *Taylor v. Okey*, 13 Ves. 180. In *Ex parte Prescott* (1 Ark. R. 231), Lord Hardwicke said, that, in cases of bankruptcy, before the making of the Act of 5 Geo. II. ch. 30, if a person was a creditor, he was obliged to prove his debt under the commission, and receive, perhaps, a dividend only of 2s. 6d. in the pound, from the bankrupt's estate, and at the same time pay the whole to the assignee of what he owed to the bankrupt. So that, it seems, that insolvency alone would not constitute a sufficient equity. See *Lord Lanesborough v. Jones* (1 P. Will. 325); *James v. Kynnier* (5 Ves. 110). In *Simson v. Hart* (14 Johns. R. 63, 76), it seems to have been thought, that the fact of insolvency created an equity, or at least fortified it. See also *Sewall v. Sparrow*,

demands will not be sufficient to justify a set-off in equity.¹ Indeed, a set-off is ordinarily allowed in equity only when the party,

16 Mass. R. 24; *Lyman v. Estes*, 1 Greenl. R. 182; *Peters v. Soame*, 2 Vern. R. 428. In *Green v. Darling* (5 Mason, R. 212), the court, after citing the principal decisions, summed up the result in the following language: "The conclusion which seems deducible from the general current of the English decisions (although most of them have arisen in bankruptcy) is, that courts of equity will set off distinct debts, where there has been a mutual credit, upon the principles of natural justice, to avoid circuitry of suits, following the doctrine of compensation of the civil law to a limited extent. That law went further than ours, deeming each debt *suo jure*, set off or extinguished *pro tanto*; whereas, our law gives the party an election to set off if he chooses to exercise it. But, if he does not, the debt is left in full force, to be recovered in an adversary suit. Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts. They have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened, which justified them in granting relief beyond the rules of law, such as has been already alluded to. And, on the other hand, courts of law sometimes set off equitable against legal debts, as in *Bottomley v. Brooke* (cited 1 T. R. 619). The American courts have generally adopted the same principles, as far as the statutes of set-off of the respective States have enabled them to act. The court adhered to the same doctrine in *Howe v. Sheppard*, 2 Sumner, R. 409, 414, 416; and *Gordon v. Lewis*, 2 Sumner, R. 628, 633, 634. See *Hendrickson v. Hinckley*, 17 How. (U. S.) R. 447.

¹ *Rawson v. Samuel*, 1 Craig & Phillips, 161, 178, 179; *Whyte v. O'Brien*, 1 Simons & Stu. 551. In the case of *Rawson v. Samuel*, Lord Cottenham said: "We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found, that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient; *Whyte v. O'Brien* (1 S. & S. 551); although it is difficult to find any other ground for the order, in *Williams v. Davies* (2 Sim. 461), as reported. In the present case, there are not even cross-demands, as it cannot be assumed that the balance of the account will be found to be in favor of the defendants at law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted, upon the balance of an unsettled account, to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, then there can be no good ground for the injunction. Several cases were cited in support of the injunction; but in every one of them, except *Williams v. Davies*, it will be found, that the equity of the bill impeached the title to the legal demand. In *Beasley v. Arcy* (2 Sch. & Lefr. 403, n.), the

seeking the benefit of it can show some equitable ground for being protected against his adversary's demand, — the mere existence of cross-demands is not sufficient. *A fortiori* a court of equity will not interfere, on the ground of an equitable set-off, to prevent the party from recovering a sum awarded to him for damages for a breach of contract, merely because there is an unsettled account between him and the other party, in respect to dealings arising out of the same contract.¹

§ 1436 *a*. However, where there are cross-demands between the parties, of such a nature, that if both were recoverable at law they would be the subject of a set-off; then, and in such a case, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in equity.² As, for example, if a legal debt is due to the defendant by the plaintiff, and the plaintiff is the assignee of a legal debt due to a third person from the plaintiff, which has been duly assigned to himself, a court of equity will set off the one against the other, if both debts could properly be the subject of a set-off at law.³

§ 1437. In the next place, courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts

tenant was entitled to redeem his lease upon payment of the rent due; and in ascertaining the amount of such rent, a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was, that he ought not to recover possession of the farm for non-payment of rent, whilst he owed the tenant a sum for damage to that same farm. In *O'Connor v. Spraight* (1 Sch. & Lefr. 305), the rent paid formed part of a complicated account; and it was impossible, without taking the account, to ascertain what sum the tenant was to pay to redeem his lease. In *Ex parte Stephens* (11 Ves. 24), the term "equitable set-off" is used; but the note having been given under a misrepresentation, and a concealment of the fact, that the party to whom it was given was at the time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In *Piggott v. Williams* (6 Madd. R. 95), the complaint against the solicitor, for negligence, went directly to impeach the demand he was attempting to enforce. In *Lord Cawdor v. Lewis* (1 Y. & Coll. 427), the proposition is too largely stated in the marginal note; for, in the case, the action for mesne profits was brought against the plaintiff, who was held, as against the defendant, to be, in equity, entitled to the land. None of these cases furnish any grounds for the injunction in the case before me."

¹ *Rawson v. Samuel*, 1 Craig & Phil. 172, 177 to 180. *Ante*, p. 662, n. 1.

² *Clarke v. Cost*, 1 Craig & Phillips, R. 154, 160.

³ *Ibid.*; *Williams v. Davies*, 2 Simons, R. 461.

accruing in different rights. But special circumstances may occur, creating an equity, which will justify even such an interposition.¹ Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt, created by such misapplication against the joint debt.² So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case, the joint debt is nothing more than a security for the separate debt of the principal; and, upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account for which the other was a security.³ Indeed, it may be generally stated, that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt.⁴

¹ *Ex parte* Twogood, 11 Ves. 517; *Addis v. Knight*, 2 Meriv. R. 121; *Duncan v. Lyon*, 3 Johns. Ch. R. 351, 352; *Dale v. Cooke*, 4 Johns. Ch. R. 13 to 15; *Harvey v. Wood*, 5 Madd. R. 460; *Tucker v. Oxley*, 5 Cranch, R. 35; *Vulliamy v. Noble*, 3 Meriv. R. 617; *Whitaker v. Rush*, Ambler, R. 407; *Bishop v. Church*, 3 Atk. 691; *Jackson v. Robinson*, 3 Mason, R. 144, 145; *Murray v. Toland*, 3 Johns. Ch. R. 573; *Medlicot v. Bowes*, 1 Ves. 208; *Leeds v. The Marine Ins. Co.* 6 Wheat. R. 565, 571; *Freeman v. Lomas*, 5 Eng. Law & Eq. R. 120; *Cherry v. Boulton*, 4 M. & C. 442. In *Tucker v. Oxley*, 5 Cranch, 34, the Supreme Court of the United States held, that under the bankrupt laws of the United States, where a suit was brought by the assignee of one partner (who had become a bankrupt) for a separate debt due to him by the defendant, who was a creditor of the partnership, the joint debt due by the partners might be set off by the creditor against the separate debt due by him to the partner who had become bankrupt. There were, however, special circumstances in the case. The partnership had been dissolved, and the separate debt was contracted afterwards with the bankrupt partner, who had agreed on the dissolution of the partnership to pay the joint debts, and who testified that he intended that the separate debt should, when contracted, be a credit for the joint debt. This might well constitute a case of mutual credit. But the court relied on the provisions of the bankrupt laws; which, in fact, on this point, did not differ from those of the English bankrupt laws.

² *Ex parte* Stephens, 11 Ves. 24; *Ex parte* Blagden, 19 Ves. 466, 467; *Ex parte* Hanson, 12 Ves. 348; *Vulliamy v. Noble*, 3 Meriv. R. 621.

³ *Ex parte* Hanson, 12 Ves. 346; S. C. 18 Ves. 252; *Dale v. Cooke*, 4 Johns. Ch. R. 15; *Cheetham v. Crook*, 1 McClell. & Y. 307.

⁴ *Vulliamy v. Noble*, 3 Meriv. 521, 593, 617, 618; *Tucker v. Oxley*, 5 Cranch, 34.

[* § 1437 *a*. The authorities upon this question are considerably examined, and the following results arrived at, in a late case.¹ The general rule, in equity as well as at law, is, that joint and separate debts cannot be set off against each other. But while at law the rule admits of no exceptions, and the parties to the record only will be regarded, a court of equity will, in a case of insolvency, regard the real parties — those ultimately to be affected by the decree — and allow a set-off of demands in reality mutual, although prosecuted in the name of others nominally interested. Courts of equity exercised a jurisdiction over the subject of set-off previous to the enactment of the statutes upon the subject; and their jurisdiction does not in any manner depend upon these statutes.]

§ 1437 *b*. It has been already suggested, that courts of equity will extend the doctrine of set-off, and claims in the nature of set-off, beyond the law in all cases, where peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration. Some cases, however, illustrative of the doctrine, may readily be put. Thus, if an agent, having a title to an estate, should allow his principal to expend money upon the estate without any notice of that title, he will not be permitted, after a recovery at law in ejectment, to maintain an action at law against the principal for mesne profits; but courts of equity will require, that, to the extent of the improvements, there shall be a set-off or compensation allowed to the principal against the mesne profits.² So, if an agent in his own name should procure a policy of insurance to be underwritten for his principal, he will be personally liable for the premium of insurance to the underwriters; and if he has also in his own name procured another policy to be underwritten for the same principal, and a loss occurs under the latter policy, on which he sues the underwriters, they may, in equity, if not at law, set off the premiums due on the first policy against such loss.³

§ 1438. We may conclude this very brief review of the doctrine

¹ [* *Blake v. Langdon*, 19 Vt. R. 485. Set-off not enforced in equity, unless it appear the plaintiff has a valid claim against the defendant which he could not have set off in the suit at law. *Wolcott v. Jones*, 4 Allen, 367.]

² *Lord Caydor v. Lewis*, 1 Younge & Coll. 427, 433. See *Money Penny v. Bristowe*, 2 Russ. & Mylne, 117.

³ *Leeds v. The Marine Insurance Company*, 6 Wheat. R. 565.

of set-off, as recognized in courts of equity, a doctrine which is practically of rare occurrence in cases not within the statutes of set-off, either at law generally, or in bankruptcy, by a few remarks upon the same subject, as it is found recognized in the civil law. In the latter, the doctrine was well known under the title of compensation, which may be defined to be the reciprocal acquittal of debts between two persons, who are indebted, the one to the other;¹ or, as it is perhaps better stated by Pothier, compensation is the extinction of debts, of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another.² The civil law itself expressed it in a still more concise form. *Compensatio est debiti et crediti inter se contributio.*³

§ 1439. The civil law treated compensation as founded upon a natural equity, and upon the mutual interest of each party to have the benefit of the set-off, rather than to pay what he owed, and then to have an action for what was due to himself. *Ideo, compensatio necessaria est, quia interest nostra potius non solvere, quam solutum repetere.*⁴ Baldus adds another and very just reason, that it avoids circuity of action. *Quod potest brevius per unum actum, expediri compensando, incassum protraheretur per plures solutiones et repetitiones.*⁵

§ 1440. It has been truly said, that the English doctrine of set-off has been borrowed from the Roman jurisprudence. But there are several important differences between compensation in the civil law, and set-off in our law.⁶ In the first place, in our law,

¹ 1 Domat, Civil Law, B. 4, tit. 2, § 1, art. 1.

² Pothier on Oblig. by Evans, n. 587 [n. 622 of French editions].—Pothier has examined the whole subject with great ability, and given a full exposition of the doctrines of the civil law, in his Treatise on Obligations, Pt. 3, ch. 4, n. 587 to 605 [n. 622 to 640 of French editions].

³ Dig. Lib. 16, tit. 2, l. 1; Pothier, Pand. Lib. 16, tit. 2, note 1.

⁴ Dig. Lib. 16, tit. 2, l. 3. See also Inst. Lib. 4, tit. 6, § 30.

⁵ Cited by Pothier on Oblig. n. 587 [n. 623 of French editions].

⁶ Mr. Chancellor Kent, in *Duncan v. Lyon* (3 Johns. Ch. R. 359), used the following language: "The doctrine of set-off was borrowed from the doctrine of compensation in the civil law. Sir Thomas Clarke shows the analogy in many respects, on this point, between the two systems; and the general rules in the allowance of compensation or set-off by the civil law, as well as by the law of those countries in which that system is followed, are the same as the English law. To authorize a set-off, the debts must be between the parties, in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated.

if the party has a right of set-off, he is not bound to exercise it; and if he does not exercise it, he is at liberty to commence an action afterwards for his own debt.¹ But in the civil law it was otherwise; for the cross-debt to the same amount was by mere operation of law, and independent of the acts of the parties, extinguished.² In support of this doctrine there are many texts of the civil law. *Posteaquam placuit inter omnes, id quod invicem debetur, IPSO JURE compensari.*³ *Unusquisque creditorem suum, eundemque debitorem, petentem summovet, si paratus est compensare.*⁴ *Si totum petas, plus petendo causa cadis.*⁵ *Si quis igitur compensare potens, solverit, condicere poterit, quasi indebito soluto.*⁶

§ 1441. In the next place, in our law, the right of compensation or set-off is confined to debts, properly so called, or to claims strictly terminating in such debts. In the civil law, the right was more extensive; for not only might debts of a pecuniary nature be set off against each other, but debts or claims for specific articles of the same nature (as for corn, wine, or cotton) might also be set off against each other. All that was necessary was that the debt or claim to be compensated, should be certain and determinate, and actually due, and in the same right, and of the same kind, as that on the other side.⁷ The general rule was: *Aliud pro alio, invito creditori, solvi non potest.*⁸ *Ejus, quod non ei debetur, qui convenitur, sed alii, compensatio fieri non potest.*⁹ *Quod in diem debetur, non compensabitur, antequam dies venit, quanquam dari oporteat.*¹⁰ *Compensatio debiti ex pari specie, et causâ dispari,*

They must be certain and determinate debts. (Dig. 16, tit. 2, de Compensationibus, Code, Lib. 4, tit. 31, l. 14, and Code, Lib. 5, tit. 21, l. 1; Ersk. Inst. Vol. 2, 525, 527; Pothier, Trait. des Oblig. No. 587 to 605; Ferrière sur Inst. tom. 6, 110, 113.)" See also *Whitaker v. Rush*, Ambler, R. 407 and 408.

¹ Pothier, by Evans, App. 112, No. 13; *Baskerville v. Brown*, 2 Burr. 1229.

² Pothier on Oblig. n. 599 [635]; 1 Domat, B. 4, tit. 2, § 8, art. 4.

³ Dig. Lib. 16, tit. 2, l. 21; Pothier Pand. Lib. 16, tit. 2, n. 3.

⁴ Dig. Lib. 16, tit. 2, l. 2; Pothier Pand. Lib. 16, tit. 2, n. 1.

⁵ Pothier Pand. Lib. 16, tit. 2, n. 3.

⁶ Ibid. n. 5; Dig. Lib. 16, tit. 2, l. 10, § 1.

⁷ 1 Domat, Civil Law, B. 4, tit. 2, § 2, art. 1 to 9; Pothier on Oblig. n. 588, 590 [n. 623, 626, of the French editions]; Pothier Pand. Lib. 16, tit. 2, n. 11 to 24; Cod. Lib. 4, tit. 31, l. 141.

⁸ Pothier on Oblig. n. 588 [n. 623, of the French editions]; Dig. Lib. 12, tit. 1, l. 2, § 1.

⁹ Cod. Lib. 4, tit. 31, l. 9; Pothier Pand. Lib. 16, tit. 2, n. 15.

¹⁰ Dig. Lib. 16, tit. 2, l. 7; Pothier, Pand. Lib. 16, tit. 2, n. 12.

*admittitur; velut, si pecuniam tibi debeam, et tu mihi pecuniam debeas, aut frumentum, aut cætera, hujusmodi, licet ex diverso contractu, compensare vel deducere debes.*¹ The only exception to the rule was, in cases of deposits; for it was said: *In causâ depositi compensationi locus non est; sed res ipsa reddenda est.*²

§ 1442. In another provision of the civil law, we may distinctly trace an acknowledged principle of equity jurisprudence upon the same subject.³ The rule that compensation should be allowed of such debts only as were due to the party himself, and in the same right, had an exception in the case of sureties. A person who was surety for a debt, might only oppose, as a compensation, what was due from the creditor to himself, but also what was due to the principal debtor. *Si quid a fidejussore petatur, æquissimum est eligere fidejussorem, quod ipsi, an quod reo debetur, compensare malit; sed etsi, utrumque velit compensare, audiendus est.*⁴

§ 1443. There was another exception in the civil law, which has not received the same favor in ours. It was generally true, that a debt, due from the creditor to a third person, could not be insisted on by the debtor, as a compensation, even with the assent of such third person; *Creditor compensare non cogitur quod alii, quam debitori suo, debet; quamvis creditor ejus pro eo, qui convenitur ob debitum proprium velit compensare.*⁵ Yet, where the debtor had procured a cession or assignment of the debt of such third person, he might, after notice to the creditor, insist upon it by way of compensation. *In rem suam procurator datus, post litis contestationem, si vice mutua conveniatur, æquitate compensationis utetur.*⁶

§ 1444. These may suffice, as illustrations of the civil law, on the subject of compensation or set-off. The general equity and reasonableness of the principles upon which the Roman superstructure is founded, make it a matter of regret, that they have

¹ Pothier, Pand. Lib. 16, tit. 2, n. 22.

² Pothier, Pand. Lib. 16, tit. 2, n. 8; Cod. Lib. 4, tit. 31, l. 11; 1 Domat, Civ. Law, B. 4, tit. 2, § 2, art. 6.

³ Ante, § 1347.

⁴ Dig. Lib. 16, tit. 2, l. 5; Pothier, Pand. Lib. 16, tit. 2, n. 16; Pothier on Oblig. n. 595 [631].

⁵ Dig. Lib. 16, tit. 2, l. 18; Pothier, Pand. Lib. 16, tit. 2, n. 16; Pothier on Oblig. n. 594 [629].

⁶ Dig. Lib. 16, tit. 2, l. 18; Pothier, Pand. Lib. 16, tit. 2, n. 15; Pothier on Oblig. n. 594 [n. 629 of the French editions].

not been transferred to their full extent into our system of equity jurisprudence. Why, indeed, in all cases of mutual debts, independently of any notion of mutual credit, courts of equity should not have at once supported and enforced the doctrine of the universal right of set-off, as a matter of conscience and natural equity, it is not easy to say. Having affirmed the natural equity, it seems difficult to account for the ground upon which they have refused the proper relief founded upon it. The very defect of the remedy at law furnishes an almost irresistible reason for such equitable relief. The doctrine of compensation has, indeed, been felicitously said to be among those things *quæ jure aperto nituntur*.¹ The universality of its adoption in all the systems of jurisprudence, which have derived their origin from Roman fountains, demonstrates its persuasive justice and sound policy.² The common law, in rejecting it from its bosom, seems to have reposed upon its own sturdy independence, or its own stern indifference. But the marvel is, that courts of equity should have hesitated to foster it, when their own principles of decision seem to demand the most comprehensive and liberal action on the subject.

CHAPTER XXXIX.

ESTABLISHING WILLS.

[* § 1445. Courts of equity have only an incidental jurisdiction of wills.

§ 1446, 1447. Mode of proceeding in such cases.

§ 1448. Proving a will in chancery.

§ 1449. Original will may be removed into chancery.

§ 1449 *a*, 1449 *b*, 1449 *c*. The present state of the law discussed.

§ 1449 *d*. A will executed upon consideration declared irrevocable in equity.]

§ 1445. WE have already stated the proper jurisdiction for determining the validity of wills,³ and that courts of equity have no

¹ See Mr. Blunt's note to *Whitaker v. Rush*, Ambler, Rep. 408; note (6).

² See Pothier on Oblig. Pt. 3, ch. 4, n. 587 to 605 [n. 622 to 640 of the French editions]; 1 Stair's Inst. B. 1, ch. 18, § 6; Ersk. Inst. B. 3, tit. 4, § 11 to 20; Heinecc. Elem. Juris. Germ. Lib. 2, tit. 17, § 475.

³ *Ante*, § 184, 238; *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 629, 630; *Pemberton v. Pemberton*, 13 Ves. 297; *Jones v. Jones*, 3 Meriv. R. 161, 170. See *Barker v. Ray*, 2 Russ. R. 63.

general jurisdiction of the subject; yet, whenever a will comes before them, as an incident in a cause, they necessarily entertain jurisdiction to some extent over the subject; and, if the validity of the will is admitted by the parties, or if it is otherwise established by the proper modes of proof, they act upon it to the fullest extent.¹ If either of the parties should afterwards bring a new suit, to contest the determination of the validity of the will so proved, the Court of Equity, which has so determined it, would certainly grant a perpetual injunction.²

§ 1446. The usual manner in which courts of equity proceed in such cases is this. If the parties admit the due execution and validity of the will, it is deemed *ipso facto*, sufficiently proved. If the will is of a personal estate, and a probate thereof is produced from the proper ecclesiastical court, that is ordinarily deemed sufficient. But if the parties are dissatisfied with the probate, and contest the validity of the will, the court of equity, in which the controversy is depending, will suspend the determination of the cause, in order to enable the parties to try its validity before the proper ecclesiastical tribunal,³ and will then govern itself by the result.⁴ If the will is of real estate, and its validity is contested in the cause, the court will, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law; and will govern its own judgment by the final result.⁵ If the will is established in either case, a perpetual injunction may be decreed.⁶

§ 1447. But, it is often the primary, although not the sole object of a suit in equity, brought by devisees and others in the interest, to establish the validity of a will of real estate; and thereupon to obtain a perpetual injunction against the heir at law, and others, to restrain them from contesting its validity in future.⁷ In

¹ See *Morrison v. Arnold*, 19 Ves. 670, 671.

² *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. R. 630; 3 Wooddes. Lect. 59, p. 477.

³ [As to the jurisdiction of a court of chancery, in determining upon the validity of a will, which had been regularly admitted to probate in the Ecclesiastical Court, and from which no appeal had been taken, see the late important case of *Allen v. McPherson*, 1 House of Lords' Cases, 191.]

⁴ *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. R. 630; 3 Wooddes. Lect. 59, p. 477.

⁵ *Ibid.*; *Attorney-General v. Turner, Ambler*, R. 587.

⁶ *Leighton v. Leighton*, 1 P. Will. 671.

⁷ *Bootle v. Blundell*, 19 Ves. 494, 509; *Jeremy on Eq. Jurisd.* B. 3, ch. 1, § 2,

such cases the jurisdiction, exercised by courts of equity, is somewhat analogous to that exercised in cases of bills of peace; and it is founded upon the like considerations in order to suppress interminable litigation, and to give security and repose to titles.¹ In every case of this sort, courts of equity will, unless the heir waives it, direct an issue of *devisavit vel non* (as it is technically, although, according to Mr. Wooddeson, barbarously expressed²), to ascertain the validity of the will.³ [According to the course of

p. 297, 298; Id. ch. 4, § 5, p. 489; *Leighton v. Leighton*, 1 P. Will. 671; *Colton v. Wilson*, 3 P. Will. 192; *Devonshire v. Newenham*, 2 Sch. & Lefr. 199; *Harris v. Cotterell*, 3 Meriv. 678, 679; *Morrison v. Arnold*, 19 Ves. 670, 671.

¹ *Ante*, § 853, 859. — The heir at law cannot come into equity, for the purpose of having an issue to try the validity of the will at law, unless it is by consent; for he may bring an ejectment. But if there are any impediments to the proper trial of the merits on such an ejectment, he may come into equity to have them removed. *Jones v. Jones*, 3 Meriv. R. 161, 170; *Bates v. Graves*, 2 Ves. Jr. 288; 1 Powell on Devises, by Jarman, ch. 15, p. 628, note (1). Courts of equity do not seem to have any direct or original authority to establish the validity of a will of real estate, *per se*, but only as incidental to some other object, as carrying into effect trusts, marshalling assets, &c. For, if no obstacles intervene, the devisee, if he has a legal estate, may sue at law. If, after repeated trials at law, in such a case, the will is established by a satisfactory verdict and judgment, courts of equity will then interfere, and grant a perpetual injunction against the heir to prevent endless litigation, as it does in other cases. *Bootle v. Blundell*, 19 Ves. 502.

² 2 Wooddes. Lect. 59, p. 478; *Bates v. Graves*, 2 Ves. Jr. 287.

³ *Pemberton v. Pemberton*, 11 Ves. 53; S. C. 13 Ves. 290; *Dawson v. Chater*, 9 Mod. 90; *Levy v. Levy*, 3 Madd. R. 245; 2 Fonbl. Eq. B. 6, ch. 3, § 7, note (t); *Cooke v. Cholmondeley*, 2 Mac. & Gord. 18; *Cooke v. Turner*, 15 Sim. 611; *Bootle v. Blundell*, 19 Ves. 501, 502. The following extract from the report of the chancery commissioners to Parliament, in March, 1826, and the explanatory paper of Mr. Beames (p. 84), shows very distinctly the practice of the courts of equity in establishing wills. "In a suit for establishing a will, the heir at law is, by the long-established practice of the court, entitled to an issue, *devisavit vel non*. But he cannot be compelled to decide, whether he will or not require such issue, until the hearing of the cause, when he will have had an opportunity of considering the evidence taken in the cause, and of satisfying his mind so far as that evidence extends, whether he should or not have the matter investigated by the *viva voce* examination of the witnesses on the trial of an issue. If he should elect to have such an issue, as all the expense incurred in examining witnesses would, in the event of their being in existence, at the time of the issue being tried, be wholly useless, and the evidence they had given in equity might, possibly, be made an improper use of by the heir, when he came to try the issue; and, at all events, that evidence might not, improbably, in some measure affect that testimony which the witnesses might give on such trial; it seems expedient to provide, that in all such suits for the establishment of wills, neither party shall, before the hearing,

modern decisions, the heir has an option either to bring an action of ejectment, or to have an issue of *devisavit vel non*.¹] But it will not feel itself bound by a single verdict either way, if it is not entirely satisfactory; but it will direct new trials, until there is no longer any reasonable ground for doubt.² [But a new trial will not be directed unless there is substantial ground for believing that, on a second trial, other evidence of a weighty nature bearing against the existing conclusion can and will be produced, which was not heard before.³] The general rule established in courts of equity is, that upon every such issue and trial at law, all the witnesses to the will should be examined, if practicable, unless the heir should waive the proof.⁴ But the rule is not absolutely inflexible, but it will yield to peculiar circumstances.⁵ When, by these means,

enter into any evidence either to support or question the will, except that the plaintiff shall examine the attesting witnesses upon the usual interrogatories, and which apply only to the formal execution of the will, and the heir may cross-examine such witnesses. See, also, *White v. Wilson*, 13 Ves. 87, 91, 92; *Bootle v. Blundell*, 19 Ves. 494, 505, 509; *Tatham v. Wright*, 2 Russ. & Mylne, 1. In *Whitaker v. Newman*, 2 Hare, R. 299, on a bill to establish a will, the heir admitted by his answer the execution of the will, but alleged that it was revoked by a subsequent will, by which the estate was devised to the heir, which subsequent will was unintentionally destroyed, and submitted that the subsequent will ought to be established, or that there was an intestacy; the court refused an issue *devisavit vel non*, and no evidence having been given of the alleged revocation, established the original will.

¹ *Grove v. Young*, 6 Eng. Law & Eq. R. 38.

² 3 Wooddeson, Lect. 59, p. 478, note (c); *Attorney-General v. Turner*, Ambler, R. 587; *Pemberton v. Pemberton*, 11 Ves. 50, 52; S. C. 13 Ves. 290; *Bootle v. Blundell*, 19 Ves. 499 to 501; *Fowkes v. Chadd*, 2 Dick. 576.

³ *Waters v. Waters*, 2 De Gex & Smale, 591. And see *McGregor v. Topham*, 3 House of Lords Cases, 132; *Hitch v. Wells*, 10 Beavan, 84.

⁴ *Jeremy on Eq. Jurisd. B.* 3, ch. 1, § 2, p. 297, 298; *Bootle v. Blundell*, 19 Ves. 499, 502, 505, 509; *Ogle v. Cooke*, 1 Ves. 177; *Tatham v. Wright*, 2 Russ. & Mylne, 1.

⁵ The doctrine was much considered in *Tatham v. Wright* (2 Russ. & Mylne, 1), which was first heard before the Master of the Rolls (Sir John Leach), who, in speaking on this point, said: "The effect of establishing a will in this court, is to conclude all future questions respecting its validity; and the caution of this court requires, therefore, before a will be established upon evidence here, that all the attesting witnesses shall be examined. If this court requires the aid of a court of law, and the intervention of a jury, to determine the validity of a will, it does not necessarily follow, that a court of law must, in such a case, depart from its own rules and adopt those of a court of equity. When all the witnesses are not examined in the court of law, and the cause comes on for further directions in a court

upon a verdict, the validity of the will is fully established, the court will by its decree declare it to be well proved, and that it of equity, there may be cases in which a court of equity, referring to its own principles, may not have its conscience fully satisfied by the verdict of the jury : — as, for instance, where the general competence of the testator being admitted, the question depends on the competency at the particular time of executing the will. There, the attesting witnesses, being the persons who can give the best testimony as to the special fact, it may be reasonable, in the Court of Equity, to send the case back, in order that all the witnesses may be examined. But when, as in the present case, the question depends not upon the particular state of the testator's mind at the making of the will, but upon his general competency throughout a long life, the attesting witnesses to the will may not be persons capable of speaking to the fact of general competency, and not, therefore, the most material witnesses in the consideration of a court of equity. It is further to be observed, that the bill filed in this case is not, by the devisees, to establish the testamentary instrument, but it is a bill by the heir at law, claiming against these instruments, to have a legal estate put out of his way, in order that he may try the validity of these instruments by ejectment ; and no decree, in this cause, would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage ; or even upon the hearing, upon further directions, he might still contend, that he ought not to be concluded by the trial of the issues, and that the Court of Equity should still permit him to proceed, by restraining the defendants from opposing to him the legal estates. It is not, however, for the present purpose, necessary to advert to these distinctions. The complaint, that the two other witnesses were not examined, is made by the heir, to whom they were tendered, who had full opportunity of examining them, but thought fit to decline that examination. He declined it, because he wished to have the technical advantage, which by the rules of law results from considering those persons witnesses of his opponent. Can he, therefore, with effect, say that it must be inferred that the witnesses, if examined, could have given evidence in his favor, when it was his own choice that such evidence should not be laid before the court ? ” The cause was reheard before Lord Chancellor Brougham, with the assistance of Lord Chief Justice Tindal and Lord Chief Baron Lyndhurst. Lord Chief Justice Tindal, in delivering the opinion of himself and the Lord Chief Baron, said : “ It may be taken to be generally true, that, in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court upon the question, *devisavit vel non*, this court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted, if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him ; in that case it is the devisee who asks for the interference of this court, and he ought not to obtain it, until he has given every opportunity to the heir at law to dispute the validity of the will. This is the ground upon which the

ought to be established, and will grant a perpetual injunction.¹ [On the other hand, if the heir does not dispute the will, but acts practice is put in the cases of *Ogle v. Cooke* (1 Ves. Sen. 177), and *Townsend v. Ives* (1 Wils. 216). But it appears clearly from the whole of the reasoning of the Lord Chancellor in the case of *Bootle v. Blundell* (1 Mer. 193, Cooper, 136), that this rule, as a general rule, applies only to the case of a bill filed to establish the will (an establishing bill, as Lord Eldon calls it, in one part of his judgment), and an issue directed by the court upon that bill. And even in cases to which the rule generally applies, this court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the plaintiff in the issue. For, in *Lowe v. Jolliffe* (1 W. Black. 365), where the bill was filed by the devisees under the will, and an issue, *devisavit vel non*, was tried at bar, it appears, from the report of the case, that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the defendant in the issue, and not by the plaintiff; for the reporter says, ‘to encounter this evidence, the plaintiff’s counsel examined the friends of the testator, who strongly deposed to his sanity’; and, again, the Chief Justice expressed his opinion to be, that all the defendant’s witnesses were grossly and corruptly perjured. And, after the trial of this issue, the will was established. In such a case, to have compelled the devisee to call these witnesses, would have been to smother the investigation of the truth. Now, in the present case, the application to this court is not by the devisee seeking to establish the will, but by the heir at law, calling upon this court to declare the will void, and to have the same delivered up. The heir at law does not seek to try his title by an ejectment, and apply to this court to direct that no mortgage or outstanding terms shall be set up against him, to prevent his title from being tried at law; but seeks to have a decree in his favor, in substance and effect, to set aside the will. This case, therefore, stands upon a ground directly opposed to that upon which the cases above referred to rest. So far from the heir at law being bound by a decree, which the devisee seeks to obtain, it is he who seeks to bind the devisee; and such is the form of his application, that, if he fails upon this issue, he would not be bound himself. For the only result of a verdict in favor of the will would be, that the heir at law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited, in which the rule has been held to apply to such a proceeding; and, certainly, neither reason nor good sense demands that this court should establish such a precedent under the circumstances of this case. If the object of the court, in directing an issue, is, to inform its own conscience by sifting the truth to the bottom, that course should be adopted with respect to the witnesses, which, by experience, is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule, that such witnesses must be called by one, and such by the other party; but by subjecting the witness to the examination in chief of that party whose interest it is to call him, from the known or expected bearing of his testimony, and to compel him to undergo the cross-examination of the adverse party, against whom his evidence is expected to make.” Lord Brougham expressed his own

¹ Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, p. 297, 298, and cases before cited.

under it, merely denying that certain lands pass under the description in the will, a court of equity has full jurisdiction to determine this question, without granting an issue of *devisavit vel non*, or it may grant such issue at its discretion.^{1]}

§ 1448. If, however, the devisees have no further present object, than merely to establish the will by perpetuating the testimony of the witnesses thereto, this may be done (as we shall presently see) by a proper bill for the purpose; and the latter is, indeed, what is usually meant by proving a will in chancery.²

§ 1449. It may be proper, also, to take notice, in this place, (although it more frequently arises in the exercise of the auxiliary or assistant jurisdiction,) that courts of equity, in cases of this sort, where the original will is lodged in the custody of the register of the Ecclesiastical Court, and it may be necessary to be produced before witnesses, resident abroad, whose testimony is to be taken under a commission to prove its due execution, will direct the original will to be delivered out by such officer to a fit person, to be named by the party in interest; such party first giving security, to be approved by the judge of the Ecclesiastical Court, to return the same within a specified time. If there is any dispute about the security for the safe custody and return of the will, it will be referred to a master to settle and adjust the same.³ If the commission is to be executed within the realm, and the witnesses are therein, the court will direct the original will to be brought into its own registry, to lie there, until the court has done with it;⁴ or to be delivered out on giving security.⁵

[* § 1449 a. In a case where the title was derived under a will which was suspicious, it appearing that the heir had failed in an action of ejectment, and afterwards in a motion for a new trial, and where the master reported in favor of the title; the Lord

opinion in the following language: "There is a broad line of distinction between cases where the moving party seeks to set the will aside, and cases where the moving party is a devisee, seeking to establish it; the rule which makes it imperative to call all the witnesses to a will must be considered as applicable to the latter only."

¹ *Rickets v. Turquand*, 1 House of Lords Cases, 472.

² 3 Black. Comm. 450.

³ *Frederick v. Aynscompe*, 1 Atk. R. 627, 628.

⁴ *Ibid.*

⁵ *Morse v. Roach*, 2 Str. 961. See *Eyres v. Broderick*, 5 English Law & Eq. R. 599.

Chancellor held, on appeal, reversing the decree of the Vice-Chancellor, that it was more consonant with the principles of the court, that the validity of the will should be conclusively determined, if possible, between the vendor and the heir, than that it should be left to be litigated between the heir and the purchaser, after the purchase-money had been paid.¹ In a case before Vice-Chancellor Page Wood, at the suit of the devisee against the heir, this subject is very elaborately discussed, and the history of this branch of equity jurisprudence traced with great minuteness. It was there held that the suit could be maintained, although the heir had brought no action of ejectment against the devisee. It is here said, that, previously to the statute of frauds, the Court of Chancery frequently took upon itself to determine the validity of wills, by inquiry before some of the masters of the court. But that practice ceased after the case of *Kerrich v. Bransby*,² in 1727; which reversed the decree of the Court of Chancery, and held that a will cannot be set aside in equity for fraud or imposition; because if it is of personal estate it may be set aside in the ecclesiastical courts, and if of real estate it may be set aside at law on the issue *devisavit vel non*. But as early as the time of James I., this course seems to have been regarded as the proper one. The proceeding in equity to establish a will against the heir differs very much from assisting to try its validity; either by removing the obstacle of an outstanding term, in which case the trial at law would be by ejectment, or by perpetuating testimony concerning the will; because, by a decree establishing the will, the heir at law is so bound, that a perpetual injunction would be granted against him if he should, after such decree, attempt to impeach the will. The origin of the jurisdiction is obscure; but, on principle, it cannot arise from the fact of the devise being in trust, for that can make no difference to the heir; or because the court experiences a difficulty, for then, in all other cases of difficulty occurring under deeds, there would be the same jurisdiction. Nor can it be for

¹ [* *Grove v. Bastard*, 2 Phillips, 619. The following cases were cited in the argument of this case: *Raworth v. Marriott*, 1 My. & K. 643; *McQueen v. Farquar*, 11 Vesey, 467; *Osbaldeston v. Askew*, 1 Russell, 160; *Green v. Pulsford*, 2 Beavan, 70. Where probate of a will is established, in the proper court, with cross-lines drawn in ink over certain legacies, it is to be thereafter considered that such erasures were made before the execution of the will. *Gann v. Gregory*, 3 De G. M. & G. 777. See also *Manning v. Purcell*, 7 De G. M. & G. 55.

² 7 Br. P. Cas. 437.

the protection of trustees, because the jurisdiction exists where there is no trust, but only the obstacle of an outstanding legal estate, which prevents the action at law. But upon principle and authority there is an inherent equity, on the part of the devisee,¹ whether legal or equitable, arising from the mere fact of the devise, to have the will established against the heir.²

§ 1449 b. But it is now settled that a purchaser of real estate, the title to which is derived under a will, is not entitled to have the will established, or to have the conveyance of the heir to him, unless some reasonable ground exists for doubting the validity of the will.³

§ 1449 c. This will have no specific application to the question of the probate of wills in this country, where, generally, they must be established in the probate courts in all cases, whether personal or real estate is concerned, unless as tending to show that where the sale of an estate by the personal representatives of the deceased owner has put the price into the assets, and the heir has thus enjoyed the benefit of it, either in whole or in part, he may be required to release his title as heir in favor of the purchaser. It is possible the courts of equity in this country might raise an equity against the heir in favor of the devisee, under some circumstances; but the ground of such equity is not as obvious as one could desire, whereon to found a decree requiring a party to relinquish his legal title.⁴

* § 1449 d. There is a recent English case where the court of equity declared a will, executed upon consideration, in order to induce a niece of the testator to reside with him, and to continue the performance of valuable services for him, in advanced age and ill health, to be irrevocable.⁵ But it is obvious in such a case, that the expectation created in the mind of the beneficiary must be something more than that ordinarily induced by the promise of a legacy, the amount and character of which rests only in the discretion of the donor. It must be, as in the last case cited, of a definite amount and character; and when, as in this case, the instrument is actually executed to induce the beneficial consideration on the part of the legatee, the case is much stronger, although that may not be altogether indispensable.]

¹ *Ante*, § 1447.

² *Boyse v. Rossborough*, Kay, 71.

³ *McCulloch v. Gregory*, 3 Kay & J. 12.

⁴ *Doolittle v. Hilton*, 26 Vt. R. 588; S. C. 28 Vt. R. 819.

⁵ *Loffus v. Maw*, 8 Jur. N. S. 607.]

CHAPTER XL.

AWARDS.

[* § 1450. Equity jurisdiction in awards.

§ 1451. Where fraud, accident, or mistake has intervened.

§ 1452. Such defects not remediable at law.

§ 1452 *a*. Award set aside for misconduct of arbitrators.

§ 1452 *b*, 1452 *c*. What degree of fraud will invalidate award.

§ 1453, 1454. Award not generally impeachable for mistake of law.

§ 1455. Mistakes in matter of law.

§ 1456. Mistakes in matter of fact.

§ 1456 *a*. The grounds of both more strictly defined.

§ 4571. Equity will not aid a party in obtaining an award.

§ 1457 *a*. Where contract requires the award of an arbitrator.

§ 4571 *b*. Cannot vary the award except for mistake or fraud.

§ 1458. Specific performance of award decreed.

§ 1458 *a*. Not requisite it should have been confirmed by the parties.

§ 1459. Rests in discretion of court when to decree specific performance.

§ 1460–1463. Rules of civil law coincide with those which prevail in equity.]

§ 1450. COURTS of equity also formerly exercised a large jurisdiction, in matters of AWARDS. But, by means of statutes, which have been passed both in England and America, the jurisdiction has become, in a practical sense, although not in a theoretical view, greatly narrowed, and is now of rare occurrence. It may not, however, be without use to refer to some of the more ordinary cases in which that jurisdiction was originally exerted, and still may be exerted, in cases where no statute of the States interferes with the due exercise thereof. And it is constantly to be borne in mind that the subsequent remarks, even when not so expressly qualified, are to be understood with this limitation, that there are no statutable provisions which vary or control the general jurisdiction of equity in matters of award.¹

¹ Com. Dig. *Chancery*, 2 K. 1 to 6; Stat. 9 & 10 Will. III. ch. 15; Bac. Abr. *Arbitration and Award*, B. The statute of 9 & 10 Will. III. ch. 15, in England, authorizing submissions to arbitrations to be made a rule of the Court of King's Bench, or other court of record, has very materially changed the jurisdiction of the English courts of equity, over awards made under submissions, made in pursuance of the statute. In *Nicholas v. Roe*, 3 Mylne & Keene, 431, the subject, how far an award made upon a submission pursuant to the statute, ousted the jurisdiction of courts of equity, was much discussed. Lord Chancellor Brougham decided against the jurisdiction, and said: "It is necessary to observe, that this

§ 1451. In cases of fraud, mistake, or accident, courts of equity may, in virtue of their general jurisdiction, interfere to set aside was a submission, not in a cause depending either here or at law, but by agreement, with the usual power for either party to make the submission a rule of the Court of King's Bench, or other court of record. It was, therefore, altogether under and within the statute of 9 & 10 W. III. ch. 15, and consequently the proceedings must be governed by that statute, and so must all the rights and equities of the parties. As there was the accustomed clause in the agreement, that no action or suit in equity should be brought by either party to impeach the award, I shall say a word upon that, in order to dismiss the point. It has frequently been denied, that any such agreement can ever oust the jurisdiction of this court; and in *Nichols v. Chalie* (14 Ves. 265), Lord Eldon said the point had never been determined. I need not now determine it; the party against whom the bill to set aside the award is filed might, had he thought fit, have availed himself of it by plea; but it is quite unnecessary towards the decision of the present question, that anything should be said upon the matter. When we examine the elaborate remarks of Lord Eldon in *Nichols v. Chalie*, and what he afterwards says in the subsequent case of *Gwinett v. Bannister* (14 Ves. 530), and compare those passages with Lord Loughborough's judgment in *Lord Lonsdale v. Littledale* (2 Ves. Jr. 451), and look into the arguments at the bar, in all the three cases, it is matter of surprise, that any doubt should ever have been entertained on the subject. For the statute is undoubtedly repealed in its most express provision, if the jurisdiction continues to reside in this court, after the parties have resorted elsewhere under the act. There can be no more plain or distinct terms used than those of the latter part of the first section of the act. After directing process of contempt to issue, for enforcing performance of the award, it proceeds thus: 'which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made to appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption, or other undue means.' I may stop here to observe, that the courts have long extended this exception to cases of mistake in law; *Kent v. Elstob* (3 East, 13). Now, this prohibition is plainly made to preclude all review of the award, either at law or in equity, excepting on those special grounds. But it is also to be intended as giving to that court only, in which the submission is made a rule, the power of reviewing the award; for, if the literal meaning of the words were adopted, namely, that, in the excepted cases, either party might go to a court of equity, and make it appear on oath, that there were grounds for impeaching the award,—first, this would prove too much, for it would enable the same party to go to some other court of law; and who ever heard of the Court of Common Pleas setting aside an award made a rule of court in the King's Bench? or who ever made such an attempt? Indeed, the second section expressly confines the application to the court in which the submission was made a rule; for it says, that 'any arbitration or umpirage, procured by corruption or undue practices, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court, where the rule is made for submission to such arbitration or umpirage

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awards upon the same principles, and for the same reasons, which justify their interference in regard to other matters, where there

before the last day of the next term, after such arbitration or umpirage made and published to the parties.' Secondly, the words used in the exception to the prohibition of the first section, that the ground of impeachment must be made to appear on oath to such court, are the words always used to describe proceedings by affidavit; and the courts of law and equity are here, and they are throughout the statute, mentioned in the same manner, so that the proceeding is to be alike in all, — not a submission made a rule of the court of law, and then a bill filed in equity to set it aside; but the submission to be made a rule, either of a court of law or a court of equity, and application made to the same court by affidavit, on the behalf of those seeking to impeach the award. It must be further observed, that the second section affixes a period of limitation, — a time within which the application must be made, where there are grounds to bring the case within the exception. It shall be, 'before the last day of the next term after such arbitration or umpirage, made and published to the parties.' This is very material; for the provision would be rendered wholly nugatory, by allowing the party to come here and file his bill, and move for his injunction, which I presume he may do, within the usual period, — that is, at any time within twenty years. Such being my clear opinion, on the construction of the statute, and its bearing upon this question, I have only to observe on the cases, that the older ones are not in similar circumstances to the present, though, as far as they go, they bear out the doctrine I contend for, and tend to exclude the jurisdiction. In this view, reference may be had to *Kampshire v. Young* (2 Atk. 155); *Chicot v. Lequesne* (2 Ves. Sen. 315); and *Spettigue v. Carpenter* (3 P. Wms. 361). But the parallel cases are the more recent ones, in the time of Lord Loughborough and Lord Eldon, which I have already mentioned; *Lord Lonsdale v. Littledale*, *Nichols v. Chalie*, and *Gwinett v. Bannister*. The first of these cases was the one in which the court sustained its jurisdiction; and Lord Eldon, in *Nichols v. Chalie*, makes some strong observations upon Lord Loughborough's argument in its favor, and plainly doubts, if he does not quite deny, the authority of the case. But what prevents its application to the question now before the court is, that *Lord Lonsdale v. Littledale* did not arise at all under the statute of 9 & 10 W. III. In that case a verdict had been taken at the trial of a cause for nominal damages, subject to a reference, and the award was made a rule of court. This is explicitly allowed, by Lord Loughborough, not to be a case within or under the statute. It is true, that his lordship goes on to state his opinion, that, even if the case were one of a reference under the statute, he should still hold the equitable jurisdiction not to be excluded. But this is merely an extrajudicial *dictum* from which, for the reasons above assigned, I take leave to dissent. Lord Eldon, in *Nichols v. Chalie*, nearly overruled it, and in *Gwinett v. Bannister*, he did so altogether. These two cases, and the last, especially, appear to close the question; and Lord Eldon, in commenting upon the statute, adopts the same construction which I have put upon it. It was a case precisely the same with the present in every particular, save one, — that here the bill was filed before the submission was made a rule of court, and in that case, the bill was filed after the submission was made a rule of court. But I do not think that this makes any material difference. In — *v. Mills* (17 Ves. 419), a sim-

is no adequate remedy at law.¹ And if there be no statute to the contrary, an agreement by the party on entering into an arbitration, not to bring any action or suit in equity to impeach the award made under it, will be held not obligatory, if there be in fact, from fraud or mistake, or accident, or otherwise, a good ground to impeach it, or to require it to be set aside.²

§ 1452. It is well known, that, when a suit is brought at the common law upon an award, no extrinsic circumstances, or matter of fact, *dehors* the award, can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct,³ or mistake of the arbitrators, is not admissible to defeat it.⁴ But courts of equity will, in all such cases, grant relief, and upon due proofs, will set aside the award.⁵

ilar distinction was taken; but Lord Eldon disposed of the application on another ground, and said nothing of this. But surely the mere filing of a bill cannot be held to destroy the force of the statutory provision, more especially as the party filing the bill might, any moment, have applied to the Court of King's Bench. He says his adversary had not made it a rule of court, and so he could not move. There never was a greater mistake; he might himself have made it a rule, and then moved. If not, any one possessed of an award in this form could defeat his adversary's right of moving to set aside the award, by not making the submission a rule of court, till the period had elapsed within which the statute allows the motion to be made impeaching it. The constant practice is the other way." See also *Nichols v. Chalie*, 14 Ves. 264.

¹ See *Duncan v. Lyon*, 3 Johns. Ch. R. 356; *Champion v. Wenham*, Ambler, R. 245; *Knox v. Symmonds*, 1 Ves. Jr. 369; *South Sea Company v. Bumstead*, 2 Eq. Abr. 80, pl. 8; *Gartside v. Gartside*, 3 Anst. 735; *Earl v. Stocker*, 2 Vern. 251; *Ives v. Metcalfe*, 1 Atk. 64; *Emery v. Wase*, 5 Ves. 846, 847; *Attorney-General v. Jackson*, 5 Hare, R. 366.

² See *Nichols v. Chalie*, 14 Ves. 264, 269; *Nichols v. Rowe*, 3 Mylne & Keen, 431; *Street v. Rigby*, 6 Ves. 815; *Cheslyn v. Dalby*, 2 Younge & Coll. 170.

³ *Hough v. Beard*, 8 Blackf. 158.

⁴ *Wills v. Maccarmic*, 2 Wills. R. 148; Bac. Abr. *Arbitrament and Award*, K.; *Braddick v. Thompson*, 8 East, 344; *Underhill v. Van Cortlandt*, 2 Johns. Ch. R. 336, 367; S. C. 17 Johns. R. 405; *Kyd on Awards*, ch. 7, p. 327.

⁵ *Lord Harris v. Mitchell*, 2 Vern. 485; *Chicot v. Lequesne*, 2 Ves. 315; *Brown v. Brown*, 1 Vern. 159, Mr. Raithby's note (1); *Lingwood v. Eade*, 2 Atk. 501; *Morgan v. Mather*, 2 Ves. Jr. 15; *Rand v. Redington*, 13 New Hamp. R. 72. The statute of 9 and 10 Will. III., ch. 15, has, in England, made great alterations in the exercise of this general jurisdiction; for it seems that an award under that statute is not generally remediable in equity, on account of fraud, or misconduct of the arbitrators; but only in the court, of which the submission is made a rule, and within the time therein prescribed. See *Auriol v. Smith*, 1 Turn. & Russ. 121, 126, 127, 134 to 136; *Ante*, § 1450, note 1; *Shepherd v. Briggs*, 28 Vt. R. 81.

[* § 1452 *a*. Where, after the hearing was closed, one of the arbitrators requested, and they all received, a statement in writing, from one of the parties, containing new and different items of claim from any presented at the hearing, and this, without the knowledge of the other party, a court of equity will enjoin a suit at law upon, and set aside, the award; notwithstanding the arbitrators swear the statement had no influence upon their award, and there is no imputation of fraud or corruption against them.¹

§ 1452 *b*. An award will not be set aside in equity on account of discreditable misconduct before the arbitrators, if the misconduct of the arbitrators was merely permissive, and the result of pardonable weakness and want of character to enable them to maintain proper decorum during the trial. But where one of the parties procured an allowance in his own favor by withholding his books and papers from inspection by the other party, when he was conscious that the claim was unfounded, and that a free inspection of the books and papers, by the other party, would disclose its fictitious character, it was held that a court of equity would set aside the award.²

§ 1452 *c*. Wherever a party before arbitrators procures the allowance of a claim which he is conscious is fictitious, and does this upon factitious or fabricated testimony, by the settled rules of equity law, the award should be set aside, and the party enjoined from maintaining an action at law to enforce it.³

§ 1453. In regard to a mistake of the arbitrators, it may be in a matter of fact, or in a matter of law. If, upon the face of the award, there is a plain mistake of law, or of fact, material to the decision, which misled the judgment of the arbitrators, there can be little or no reason to doubt that courts of equity will grant relief.⁴ But the difficulty is, whether the mistake of fact or of law is to be made out by extrinsic evidence; and, whether a mistake of law upon a general submission, involving the decision both of law and of fact, constitutes a valid objection. Upon these points, the decisions of courts of law and courts of equity are not recon-

¹ [* *Cleland v. Hedly*, 5 Rh. I. R. 163.

² *Cutting v. Carter*, 29 Vt. R. 72.

³ *Emerson v. Udall*, 13 Vt. R. 477; *Cutting v. Carter*, 29 Vt. R. 72.]

⁴ *Corneforth v. Greer*, 2 Vern. 705; *Ridout v. Payne*, 1 Ves. 11; S. C. 3 Atk. 494.

cilable with each other; and it is not easy to lay down any doctrine, which may not be met by some authority.¹

§ 1454. Perhaps the following will be found to be the doctrines most reconcilable with the leading authorities. Arbitrators, being the chosen judges of the parties, are, in general, to be deemed judges of the law, as well as of the facts, applicable to the case upon them. If no reservation is made in the submission, the parties are presumed to agree, that every question, both as to law and fact, necessary for the decision, is to be included in the arbitration. Under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and on the fact.² And, under such a submission, they are not bound to award on mere dry principles of law; but they make their award according to the principles of equity and good conscience.³ Subject, therefore, to the qualifications, hereafter mentioned, a general award cannot be impeached collaterally, or by evidence *aliunde*, for any mistake of law or of fact, unless there be some fraud or misbehavior in the arbitrators.⁴ These qualifications will now be stated.

¹ In *Chace v. Westmore* (13 East. R. 158), Lord Ellenborough said: "I fear it is impossible to lay down any general rule upon this subject, in what cases the court will suffer an award to be opened. It must be subject to some degree of uncertainty, depending upon the circumstances of each case."

² [See the late able case of *Boston Water-Power Co. v. Gray*, 6 Met. 131; *Fairchild v. Adams*, 11 Cush. R. 549.]

³ *Knox v. Symmonds*, 1 Ves. Jr. 369; *South Sea Company v. Bumstead*, 3 Eq. Abr. 80, pl. 8; *Shepard v. Merrill*, 2 Johns. Ch. R. 276; *Delver v. Barnes*, 1 Taunt. R. 48, 51.

⁴ *Morgan v. Mather*, 2 Ves. Jr. 15 to 17, 22; *Knox v. Symmonds*, 1 Ves. Jr. 369; *Chace v. Westmore*, 13 East, 357, 358; *Todd v. Barlow*, 2 Johns. Ch. R. 551; *Herrick v. Blair*, 1 Johns. Ch. R. 101; *Underhill v. Van Cortlandt*, 2 Johns. Ch. R. 339, 361; *Greenhill v. Church*, 3 Ch. R. 49 [88]; *Cavendish v. —*, 1 Ch. Cas. 279; *Brown v. Brown*, 1. Vern. 157; *Emery v. Wase*, 5 Ves. 846; *Ives v. Metcalfe*, 1 Atk. 64; *Tittenson v. Peat*, 3 Atk. 529; *Champion v. Wenham*, Ambler, R. 245; *Boutillier v. Tick*, 1 Dowl. & Ryl. 366; *Wood v. Griffith*, 1 Swanst. 43; Com. Dig. *Chancery*, 2 K. 6. In *Knox v. Symmonds* (1 Ves. Jr. 369), Lord Thurlow said: "A party to an award cannot come to have it set aside upon the simple ground of erroneous judgment in the arbitrator; for to his judgment they refer their disputes, and that would be a ground for setting aside every award. In order to induce the court to interfere, there must be something more; as corruption in the arbitrator, or gross mistake, either apparent upon the face of the award, or to be made out by evidence. But in case of mistake, it must be made out to the satisfaction of the arbitrator; and the party must convince him that his judgment was influenced by that mistake, and that, if it had not happened, he should have made a different award. But this relates only to a general reference

§ 1455. First; in regard to matters of law. If arbitrators refer any point of law to judicial inquiry, by spreading it on the face of their award, and they mistake the law in a palpable and material point, their award will be set aside.¹ If they admit the law, but decide contrary thereto upon principles of equity and good conscience, although such intent appear upon the face of the award, it will constitute no objection to it. If they mean to decide strictly according to law, and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient to set it aside.² But their decision upon a doubtful point of law, or in a case where the question of law itself is designedly left to their judgment and decision, will generally be held conclusive.³

§ 1456. Secondly; in regard to matters of fact, the judgment of the arbitrators is ordinarily deemed conclusive.⁴ If, however,

to arbitration of all matters in dispute between the parties. But upon a reference to an arbitrator, to inquire into facts, &c., the reference is to him in the character of a master; and the court is to draw the conclusion; and, if the arbitrator has taken upon himself to do so, the court will see that he has drawn a right conclusion. Upon a general reference to arbitration of all matters in dispute between the parties, the arbitrator has a greater latitude than the court, in order to do complete justice between the parties; for instance, he may relieve against a right which bears hard upon one party, but which, having been acquired legally, and without fraud, could not be resisted in a court of justice." See *Nichols v. Roe*, 3 Mylne & Keen, 438, 439.

¹ *Knox v. Symmonds*, 1 Ves. Jr. 369; *Ridout v. Payne*, 3 Atk. 494; *Kent v. Elstop*, 3 East, R. 18. See *Veghte v. Hoagland*, 2 Stockton, Ch. R. 45.

² *Kleine v. Catara*, 2 Gallis. R. 70, 71; *Young v. Walter*, 9 Ves. 364, 366; *Blennerhassett v. Day*, 2 Ball & Beatt. 120; *Ainslee v. Goff*, Kyd on Awards, ch. 7, p. 351 to 354 (2d edit.); S. C. cited in *Delver v. Barnes*, 1 Taunt. R. 48, 53, note (a); *Richardson v. Nourse*, 3 Barn. & Ald. 237.

³ *Ching v. Ching*, 6 Ves. 282; *Younge v. Walter*, 9 Ves. 364; *Chace v. Westmore*, 13 East, R. 357; *Campbell v. Twemlow*, 1 Price, R. 81; *Steff v. Andrews*, 2 Madd. R. 6, 9; *Wood v. Griffith*, 1 Swanst. 55; *Underhill v. Van Cortlandt*, 2 Johns. Ch. R. 339; *Roosevelt v. Thurman*, 1 Johns. Ch. R. 220, 226; *Richardson v. Nourse*, 3 Barn. & Ald. 237; *Sharman v. Bell*, 5 Maule & Selwyn, 504. Even at law, in *Chace v. Westmore* (13 East, R. 358), Lord Ellenborough said: "But it is enough to say, in the present case, where the merits in law and fact were referred to a person competent to decide upon oath, we will not open the award, unless it could be shown to be so notoriously against justice and his duty, as an arbitrator, that we could infer misconduct on his part."

⁴ See *Price v. Williams*, 1 Ves. Jr. 365; S. C. 3 Bro. Ch. R. 163; *Morgan v. Mather*, 2 Ves. Jr. 15 to 18, 20, 22; *Dick v. Milligan*, 2 Ves. Jr. 23; *Goodman v. Sayers*, 2 Jac. & Walk. 249, 259.

there is a mistake of a material fact apparent upon the face of the award; or, if the arbitrators are themselves satisfied of the mistake, and state it, (although it is not apparent on the face of the award); and if, in their own view, it is material to the award, then, although made out by extrinsic evidence, courts of equity will grant relief.¹

[* § 1456 *a*. The mistake in matter of law, to render the award voidable in equity, must appear by the question being stated on the face of the award, as a justification of the conclusion to which the arbitrators came; or else it must be shown that the arbitrators, intending to follow the law, have misapprehended it, and were thus brought to a different result from what they would otherwise have reached.² And in regard to matter of fact, which shall be sufficient to invalidate an award, it must be something more than the misjudgment of the arbitrator, in weighing evidence, or the construction of written admissions. The mistake must be one which shows that the arbitrator was misled, and thus failed to comprehend the true facts of the case; as by a mistake in computation, or in a date, material to the rights of the parties, or by the use of false measures, or false weights, or in some similar mode. A mere error in judgment is no mistake which a court of equity can correct, since the judgment of the chancellor is as fallible as that of the arbitrator.³]

§ 1457. Courts of equity will not enforce the specific performance of an agreement to refer any matter in controversy between adverse parties, deeming it against public policy to exclude from the appropriate judicial tribunals of the State any persons who, in the ordinary course of things, have a right to sue there.⁴ Neither

¹ *Knox v. Symmonds*, 1 Ves. Jr. 369. See *Rogers v. Dallimore*, 6 Taunt. R. 111. These distinctions are principally drawn from the case of *Kleine v. Catara* (2 Gallis, R. 71), where the principal authorities are collected. See also *Bac. Abr. Arbitrament and Award*, K.; *Com. Dig. Chancery*, 2 K. 1 to 6; *Kyd on Awards*, ch. 7, p. 327 to 380 (2d edit.); *Watson on Arbitration*, ch. 9, § 4, p. 161 to 178; *Attorney-General v. Jackson*, 5 Hare, R. 366.

² [* *White v. White*, Ex'rs, 21 Vt. R. 250.

³ *Vanderwerker v. Vt. Central Railroad*, 27 Vt. R. 130; *Jones v. Boston Mill Corporation*, 6 Pick. R. 148.]

⁴ *Kill v. Hollister*, 1 Wils. R. 129; *Mitchell v. Harris*, 4 Bro. Ch. R. 312, 315; *S. C.* 2 Ves. Jr. 131; *Street v. Rigby*, 6 Ves. 815, 818; *Crawshay v. Collins*, 1 Swanst. R. 40; *Agar v. Macklew*, 2 Sim. & Stu. 418; *Gourlay v. Somerset*, 19 Ves. 431; *Toby v. The County of Bristol*, 3 Story, R. 800.

will they, for the same reason, compel arbitrators to make an award;¹ nor, when they have made an award, will they compel them to disclose the grounds of their judgment.² The latter doctrine stands upon the same ground of public policy as the others; that is to say, in the first instance, not to compel a resort to these domestic tribunals, and, on the other hand, not to disturb their decisions, when made, except upon very cogent reasons.

[* § 1457 *a*. But under a contract to pay the covenantee such damages, in a certain contingency, as a third person shall award, there is, in the absence of fraud, no cause of action, either at law or in equity, unless the award is made. Thus, where a contract for the performance of works contained a provision, that if the contractor should not, in the opinion of the employers' engineer, exercise such due diligence as would enable the works to be completed, according to the contract within the time limited, the employers might determine the contract, and the contractor should be paid such sum as the engineer should determine to have been reasonably earned for work actually done; and the contract being determined under the provision, the contractor filed a bill against the employers and their engineer, complaining of undue delay in awarding the amount earned by the contractor, and seeking payment of what was due upon the contract, but did not establish fraud or collusion against the engineer; it was held, the bill could not be maintained.³

§ 1457 *b*. And where in such a case the award of the engineer had been made, and the contractor claims a larger sum in addition, it is incumbent, in order to maintain a bill in equity for that purpose, that he should establish fraud and collusion between the employers and their engineer, or else that essential and material mistakes should have intervened. And if such collusion were

¹ Kyd on Awards, ch. 4, p. 100 (2d London edit.). In this respect our law differs from the Roman law; for, by the latter, arbitrators would, unless under special circumstances, be compelled to make an award, when they had taken the office upon themselves. Dig. Lib. 4, tit. 8, l. 3, § 1, 3; Kyd on Awards, ch. 4, p. 98, 99, and note (2d London edit.); *Post*, § 1496.

² Anon. 3 Atk. 644; Story on Eq. Plead. § 825, note 1.

³ [* *Scott v. The Corporation of Liverpool*, 3 De Gex & J. 334; *Herrick v. Belknap* and the *Vt. Cen. Railw.* 27 Verm. R. 673. But a rule, or by-law, of a society, that all disputes among the members shall be settled by arbitration, does not oust the jurisdiction of the courts of equity, to compel an account. *Smith v. Lloyd*, 26 Beavan, 507.

only for the purpose of obtaining temporary indulgence, with the design of ultimately paying the full sum due the contractor, a court of equity will nevertheless have jurisdiction of the matter,¹ and will decree payment to the contractor of any deficiency in the estimates which is clearly established.]

§ 1458. When an award has actually been made, and it is unimpeached and unimpeachable, it constitutes a bar to any suit for the same subject-matter, both at law and in equity. And courts of equity will, in proper cases, enforce a specific performance of an award, which is unexceptionable, and which has been acquiesced in by the parties, if it is for the performance of any acts by the parties in specie, such as a conveyance of lands; and such a specific performance will be decreed, almost as if it were a matter of contract, instead of an award.²

[* § 1458 a. In a case,³ where the party obtaining an award for the conveyance of real estate brought a bill in equity for specific performance of the award, the question how far it is requisite that the award should have been confirmed by the party against whom it was made, in order to justify a decree for a conveyance, is examined with considerable carefulness, and the authorities upon the question reviewed, and the conclusion declared to be, that the early dicta to that effect have not been followed in the courts of equity in later times, and that such ratification of the award is not necessary, in order to justify the court in decreeing specific performance; but that the court will decree a specific performance of an award under seal, following a submission under seal, directing the conveyance of real estate, the same as it will a contract, in the same form and to the same effect, signed by the parties.⁴]

¹ *Herrick v. Belknapp*, 27 Verm. R. 673.]

² *Hall v. Hardy*, 3 P. Will. 187; *Thomson v. Noel*, 1 Atk. 62; *Norton v. Mascall*, 2 Ch. Rep. 304; S. C. 2 Vern. 24; *Wood v. Griffith*, 1 Swanst. 54; *Bouck v. Wilber*, 4 Johns. Ch. R. 405; Com. Dig. *Chancery*, 2 K. Lord Hardwicke, in *Thomson v. Noel* (1 Atk. 62), said: "A bill to carry an award into execution, where there is no acquiescence in it by the parties to the submission, or agreement by them afterwards to have it executed, would certainly not lie. But the remedy, to enforce performance of the award, must be taken at law." See also *Bishop v. Webster*, 1 Eq. Abr. 51; S. C. 2 Vern. 444.

³ [* *Akely v. Akely*, 16 Vt. R. 450.

⁴ *Milnes v. Gery*, 14 Vesey, 400; *Blundell v. Brettargh*, 17 Id. 234-241; *Jones v. Boston Mill Corporation*, 6 Pick. R. 148; *Shelton v. Alcox*, 11 Conn. R. 240; *Carey v. Wilcox*, 6 N. H. R. 179, 180.]

§ 1459. But, as the specific performance of awards, as well as of contracts, rests in the sound discretion of the courts, if, upon the face of the award or otherwise, it appears that there are just objections to enforcing it, courts of equity will not interfere.¹ On the other hand, where an award has been long acquiesced in or acted upon by both parties, even although objections might have been originally urged against it, an application to set it aside will not be entertained.²

§ 1460. It is curious to remark the coincidences between the civil law and our law, in regard to arbitrations and awards. Whether we are to attribute this to the origin of the latter in the established jurisprudence of the former; or to the same good sense, prevailing in different nations, and establishing the like equitable principles on the same subject, founded on public policy and private convenience, it is not necessary to discuss. But it is certain, that the Roman law has much to commend it in the reasonableness of its doctrines.

§ 1461. Arbitration, called compromise, (*compromissum*,) was a mode of terminating controversies much favored in the civil law, and was usually entered into by reciprocal covenants or obligations, with a penalty, or with some other certain or implied loss;³ and the award was deemed to partake of the character of a judicial proceeding.⁴ *Compromissum ad similitudinem judiciorum redigitur, et ad finiendas lites pertinet.*⁵ *Ex compromisso placet exceptionem non nasci, sed pænæ petitionem.*⁶ The general con-

¹ *Auriol v. Smith*, 1 Turn. & Russ. R. 187, 189, 190; *Eyre v. Good*, 2 Ch. Rep. 19 [34]; *Wood v. Griffith*, 1 Swanst. 54; *Emery v. Wase*, 5 Ves. 846; *Com. Dig. Chancery*, 2 K. 2.

² *Jones v. Bennett*, 2 Bro. Parl. R. 411, 428.

³ *Pothier, Pand. Lib. 4, tit. 8, n. 13, 14; Dig. Lib. 4, tit. 8, l. 11, § 2, 3; Ibid. l. 13, § 1; Ibid. l. 27, § 6.*

⁴ If there was a simple agreement to stand by the award, without any penalty or equivalent, it seems that in the civil law there was originally no remedy to enforce it. Justinian, in some cases, but not adequately (as it should seem), provided for this defect. See *Kyd on Awards*, ch. 1, p. 8, 9 (2d London edit.), which cites *Dig. Lib. 4, tit. 8, l. 27, § 6, 7*, where it is said: *Et, si quis presens arbitrum sententiam dicere prohibuit, pœna committetur. (§ 6.) Sed, si pœna non fuisset adjecta compromisso, sed simpliciter, sententiæ stari quis promiserit, incerti adversus eum foret actio. (§ 7.)* See also *Cod. Lib. 2, tit. 56, l. 4, 5.*

⁵ 1 Domat, B. 1, tit. 14, § 1, art. 2; *Dig. Lib. 4, tit. 8, l. 1; Pothier, Pand. Lib. 4, tit. 8, n. 1.*

⁶ 1 Domat, B. 1, tit. 14, § 1, art. 3; *Dig. Lib. 4, tit. 8, l. 2.*

clusiveness of awards, when made within the legitimate powers of the arbitrators, was firmly established upon the same principles, which ought universally to prevail, to suppress litigation. *Stari autem debet sententiæ arbitri, quam de re dixerit, sive æqua, sive iniqua sit; et sibi imputet, qui compromisit.*¹

§ 1462. The leading, though not the only exception to the conclusiveness of awards, when regularly made, was the fraud or corruption of the parties or of the arbitrators. *Posse eum uti doli mali exceptione.* Again: *Etiam si appellari non potest, doli mali exceptionem in pænæ petitione obstaturam.*² Another exception was, that the arbitrators had, in their award, exceeded their authority; for, if they had, it was void. *De officio arbitri tractantibus sciendum est, omnem tractatum ex ipso compromisso sumendum. Nec enim aliud illi licebit, quam quod ibi, ut efficere posset, cautum est. Non ergo quodlibet statuere arbiter poterit, nec in re qualibet; nisi de quâ re compromissum est, et quatenus compromissum est.*³

§ 1463. Subject to exceptions of this nature, it has been justly remarked by an eminent judge, that the prætor at Rome would not interfere with the decisions of these domestic tribunals for the very reasons which have been adopted in modern times; because they put an end to suits, and the arbitrators were judges of the parties' own choice.⁴ *Tametsi neminem prætor cogit arbitrium recipere (quoniam hæc res libera et soluta est, et extra necessitatem jurisdictionis posita); attamen, ubi semel quis in se receperit arbitrium, ad curam et sollicitudinem suam hanc rem pertinere prætor putat; non tantum, quod studeret lites finire, verum quoniam non deberent decipi, qui eum, quasi virum bonum, disceptatorem inter se eligerunt.*⁵ Indeed, when once arbitrators had taken upon themselves that office they were compellable by the prætor to make an award. *Quisquamne potest negare, æquissimum fore, prætorem interponere se debuisse, ut officium, quod in se recepit, impleret. Et quidem arbitrum cujuscunque dignitatis coget officio, quod sus-*

¹ Dig. Lib. 4, tit. 8, l. 27, § 2; Pothier, Pand. Lib. 4, tit. 8, n. 39, 40.

² Dig. Lib. 4, tit. 8, l. 32, § 14; Ibid. l. 31; Pothier, Pand. Lib. 4, tit. 8, n. 40, 47, 48.

³ Dig. Lib. 4, tit. 8, l. 32, § 15; 1 Domat, B. 1, tit. 4, § 2, art. 6; Pothier, Pand. Lib. 4, tit. 8, n. 41, 42.

⁴ Mr. Chancellor Kent, in *Underhill v. Van Cortlandt*, 2 Johns. Ch. R. 368.

⁵ Dig. Lib. 4, tit. 8, l. 3, § 1; Pothier, Pand. Lib. 4, tit. 8, n. 22.

ceperit, perfungi.¹ In this respect, there is a marked distinction between our law and the civil law.²

CHAPTER XLI.

WRITS OF NE EXEAT REGNO AND SUPPLICAVIT.

[* § 1464. Remedies affecting exclusive jurisdiction in equity.

§ 1465. Origin of writ of *Ne exeat regno*.

§ 1466. Regarded as one of the prerogatives of the crown.

§ 1467. When first resorted to as a civil remedy.

§ 1468. Applied in such cases with caution.

§ 1469. Merely a civil remedy in America.

§ 1470. In the nature of equitable bail.

§ 1471. Applied also to cases of alimony and account.

§ 1472. How its exercise, in cases of alimony, is regulated.

§ 1473. In account, is granted on ground of concurrent jurisdiction.

§ 1474. In equitable demands must be absolute and liquidated.

§ 1475. How regulated, where parties are foreigners.

§ 1476. Definition of writ of *supplicavit*.

§ 1477. This is a remedy for breach of privilege of protection of court.

§ 1478, 1479. Issues of law, and of fact, may be sent to courts of law.

§ 1479 a. Result treated as conclusive of rights of parties,* unless good reason be shown.]

§ 1464. WE are next led to the consideration of those branches of exclusive jurisdiction of courts of equity which arise from, or are dependent upon, the nature of the remedy to be administered. The peculiar remedies connected with the exclusive jurisdiction in equity seem to be principally the process of bill of discovery, properly so called; the process of bill for perpetuating evidence; and the processes, called the writ of NE EXEAT REGNO, and the writ of SUPPLICAVIT.³ The two former are properly embraced in what is

¹ Dig. Lib. 4, tit. 8, l. 3, § 1, 3; Kyd on Awards, 98, 99, and note (2d London edit.).

² *Ante*, § 1457.

³ The authority to award an issue to be tried by a jury, though a peculiar remedy, is an incident both to the concurrent and the exclusive jurisdiction of courts of equity. The granting or refusing of such an issue, is, in all cases, except in questions of the validity of wills (*Ante*, § 184, 1446), a matter of discretion; and is designed merely to assist the conscience of the court in deciding upon some matter of fact. It seems, rather, therefore, to belong to the practice of the court than to constitute a part of its peculiar jurisdiction. See, on this

called the auxiliary or assistant jurisdiction of courts of equity; and will, therefore, be reserved for examination thereafter. The two latter will be discussed in the present chapter.

§ 1465. The writ of *Ne exeat regno*, or, as it is sometimes termed, *Ne exeat regnum*, is a prerogative writ, which is issued, as its name imports, to prevent a person from leaving the realm.¹ It is said that it is a process unknown to the ancient common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure.² Its origin is certainly obscure. But it may be traced up to a very early period, although some have thought that its date is later than the reign of King John, since, by the great charter granted by him, the unlimited freedom to go from and return to the kingdom at their pleasure, was granted to all subjects. *Liceat unicuique de cætero exire de regno nostro, et redire salvo et secure per terram et per aquam, salva fide nostra, nisi tempore guerræ, per aliquod breve tempus, propter communem utilitatem regni.*³ The period between the reign of King John and that of Edward I. has been accordingly assigned by some writers as the probable time of its introduction. A proceeding somewhat similar in its nature and objects, though not in the precise form of the modern writ, is distinctly mentioned by Fleta and Britton;⁴ and the statute of 5 Rich. II. (ch. 2, § 6, 7,) prohibited all persons whatsoever from going abroad, excepting lords and great men, and merchants and soldiers.⁵

§ 1466. In Fitzherbert's *Natura Brevium*, two forms of writs are given against subjects leaving the realm without license, the one applicable to clergymen, and the other to laymen.⁶ And it is there remarked by Fitzherbert, that, by the common law, every subject, *O'Connor v. Cook*, 8 Ves. 536; *Short v. Lee*, 2 Jac. & Walk. 496, 497; *Jeremy on Eq. Jurisd. B. 3*, ch. 1, § 2, p. 295 to 299; 2 *Fonbl. Eq. B. 6*, ch. 3, § 7, and notes (*t*), (*u*); *Matthews v. Warner*, 4 Ves. R. 206; *Lancashire v. Lancashire*, 9 Beavan, R. 259.

¹ Beames on *Ne Exeat*, p. 1; 1 *Black. Comm.* 137, 266. Most of the materials, which are contained in this chapter, have been drawn from the concise, but perspicuous treatise of Mr. Beames, entitled, "A Brief View of the Writ of *Ne Exeat Regno*, London, 1812." I have not omitted, however, to compare the observations of the author with the original authorities.

² Beames, on *Ne Exeat*, p. 1.

³ *Ibid.*, p. 3.

⁴ Fleta, 383, § 1, 2; Britton, ch. 112, cited in Beames on *Ne Exeat*, p. 4, 5.

⁵ Beames on *Ne Exeat*, p. 6.

⁶ *Fitz. Nat. Brev.* 85.

man may go out of the realm at his pleasure, without the king's leave; yet, because every man is bound to defend the king and his realm, therefore the king, at his pleasure, by his writ, may command a man, that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary, he shall be punished for disobeying the king's command.¹ From this language, it may be inferred, as his opinion, that the right of the king was a part of the common law, not at all incompatible with the ordinary right of the subject to leave the realm; but a restriction upon that right, which might be imposed by the crown for great political purposes. This is manifestly the view of the matter taken by Lord Coke, who deems it a part of the prerogative of the crown, at the common law, and not dependent upon any statute *pro bono publico regis et regni*.²

§ 1467. Be the origin of this writ, however, as it may, it was originally applied only to great political objects and purposes of state, for the safety or benefit of the realm.³ The time when it was first applied to mere civil purposes, in aid of the administration of justice, is not exactly known, and seems involved in the like obscurity as its primitive existence. It seems, however, to have been so applied as early as the reign of Queen Elizabeth.⁴ In the reign of King James I. it seems to have been so firmly established, as a remedial civil process, grantable in chancery, that it was made the subject of one of Lord Bacon's Ordinances. It is there declared, that "Writs of Ne exeat regnum are properly to be granted according to the suggestion of the writ in respect of attempts prejudicial to the king and state; in which case the Lord

¹ Fitz. Nat. Brev. 85.

² 2 Co. Inst. 54; 3 Co. Inst. ch. 84, p. 178, 179; Com. Dig. *Chancery*, 4 B.

³ *Ex parte Bruncker*, 3 P. Will. 312; Anon. 1 Atk. 521; *Flack v. Holm*, 1 Jac. & Walk. 405, 413, 414.

⁴ Tothill, in his transactions (p. 136), mentions three cases, one in the 32d of Elizabeth, and two in the 19th of James I. See also Beames, Ord. of Chanc. p. 40, note (148); Beames on Ne Exeat, p. 16. Lord Chancellor Talbot, in *Ex parte Bruncker* (3 P. Will. 312), said: "In all my experience, I never knew this writ of Ne exeat regno granted or taken out, without a bill in equity first filed." It is true, it was originally a State writ; but for some time (though not very long), it has been made use of in aid of the subjects, for the helping them to justice. But still as custom has allowed this latter use to be made of it, it ought to go no further than can be warranted by usage, which always has been to have a bill first filed." A copy of the modern writ will be found in Beames on Ne Exeat, p. 19, 20, and Hinde's Practice, p. 613.

Chancellor will grant them, upon prayer of any of the principal secretaries, without cause showing, or upon such information as his lordship shall think of weight. *But, otherwise also, they may be according to the practice of long time used,* in case of interlopers in trade, great bankrupts, in whose estates many subjects are interested, or other cases that concern multitudes of the king's subjects; also in case of duels and divers others."¹

§ 1468. The ground, then, upon which it is applied to civil cases being, as is here stated, custom or usage, it has been in practice uniformly confined to cases within the usage, and therefore, it is perhaps impossible to expound its true use or limitation upon principle.² It has been strongly said, that it is applied to cases of private right with great caution and jealousy.³

§ 1469. The writ of *Ne exeat regno* is also in use in America, where it is treated not as a prerogative writ, but as a writ of right in the cases in which it is properly grantable. But, generally, the same limitations which are imposed as to the remedy in England, exist in our present practice. In short, the writ and its attributes are almost entirely derived from the English authorities and practices.⁴ [And it may be granted against foreigners temporarily within the jurisdiction of the court, as well as others.⁵]

§ 1470. In general, it may be stated, that the writ of *Ne exeat regno* will not be granted, unless in cases of equitable debts and claims; for, in regard to civil rights, it is treated as in the nature of equitable bail.⁶ If, therefore, the debt be such as that it is de-

¹ Beames, *Ord. in Chanc.* p. 39, 40, *Ord.* 89; Beames on *Ne Exeat*, p. 16, 17.

² *Ex parte Brunker*, 3 P. Will. 313; *Etches v. Lance*, 7 Ves. 417; *De Carriere v. De Calonne*, 4 Ves. 590.

³ *Tomlinson v. Harrison*, 8 Ves. 32; *Whitehouse v. Partridge*, 3 Swanst. 379.

⁴ *Rice v. Hale*, 5 Cush. 238, where the form of the writ is set out. *Bushnell v. Bushnell*, 15 Barbour, 399; *Forrest v. Forrest*, 10 Id. 46; *McGee v. McGee*, 8 Geo. 295; *Lehman v. Logan*, 7 Ired. Eq. R. 296; *Brown v. Haff*, 5 Paige, 235. By the Act of Congress, of 2d March, 1793, ch. 22, § 5, it is provided that "Writs of *Ne exeat* may be granted by any judge of the Supreme Court of the United States in cases where they may be granted by the supreme, or a circuit court. But no writ of *Ne exeat* shall be granted, unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."

⁵ *Gibert v. Colt*, 1 Hopk. Ch. R. 496. And see *Woodward v. Schatzell*, 3 Johns. Ch. R. 412.

⁶ Beames on *Ne Exeat*, p. 30; *Seymour v. Hazard*, 1 Johns. Ch. R. 1; *Ex parte Brunker*, 3 P. Will. 312; *Atkinson v. Leonard*, 3 Bro. Ch. R. 218; *Jackson*

mandable in a suit at law, the writ will be refused ; for, in such a case, the remedy at law is open to the party.¹ If bail may be required, it can be insisted on in the action at law ; if not required at law, that furnishes no ground for the interference of a court of equity, to do what in effect, as to legal demands, the law inhibits.² [And it has been held, that, if the party against whom this writ is prayed for has previously been held to bail, and regularly discharged, the writ will not be granted.³]

§ 1471. It has been said in the preceding remarks, that, in general, the writ of *Ne exeat regno* lies only upon equitable debts and claims. There are to this general statement two recognized exceptions, and two only. The one is a case of alimony decreed to a wife, which will be enforced against her husband by a writ of *Ne exeat regno*, if he is about to quit the realm ;⁴ the other is the case of an account, on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor.⁵

§ 1472. In regard to alimony, it has been said, that it arose from compassion, and because the ecclesiastical courts could not take bail.⁶ Whether this be the real origin of the jurisdiction in *v. Petrie*, 10 Ves. 163, 165 ; *Whitehouse v. Partridge*, 3 Swanst. R. 377 to 379 ; *Dawson v. Dawson*, 7 Ves. 173 ; *Haffey v. Haffey*, 14 Ves. 261 ; *Stewart v. Graham*, 19 Ves. 313, 314 ; *Hyde v. Whitfield*, 19 Ves. 344 ; *Flack v. Holm*, 1 Jac. & Walk. 405, 413, 414 ; *Jenkins v. Parkinson*, 2 Mylne & Keen, 5. In Wyatt's Practical Register, p. 289, it is said : " It is now mostly used, where a suit is commenced in this court against a man, and he, designing to defeat the other of his just demand, or to avoid the justice and equity of this court, is about to go beyond sea, or however, that the duty will be endangered, if he goes." The usual affidavit, on which the writ is granted, states both of these facts. Beames on *Ne Exeat*, p. 26 to 28.

¹ *Ibid.* ; *Dawson v. Dawson*, 7 Ves. 173 ; *Russell v. Ashby*, 5 Ves. 96 ; *Blaydes v. Calvert*, 2 Jac. & Walk. 211, 213 ; *Smedberg v. Mark*, 6 Johns. Ch. R. 138.

² *Porter v. Spencer*, 2 Johns. Ch. R. 169, 170 ; *Crosly v. Marriot*, 2 Dick. R. 609 ; *Gardner v. —*, 15 Ves. 444.

³ *Pratt v. Wells*, 1 Barb. 425.

⁴ *Read v. Read*, 1 Ch. Cas. 115 ; *Shaftoe v. Shaftoe*, 7 Ves. 71 ; *Dawson v. Dawson*, 7 Ves. 173 ; *Anon.* 2 Atk. 210 ; *Ante*, § 1425, note (2).

⁵ Beames on *Ne Exeat*, p. 30 to 34 ; *Id.* p. 38 ; 2 Madd. Ch. Pr. 182 to 187 ; *Cooper*, Eq. Pl. ch. 3, p. 149, 150.

⁶ Beames on *Ne Exeat*, 30 ; *Anon.* 2 Atk. 210 ; *Vandergucht v. De Blaquiére*, 8 Sim. R. 315. The Vice-Chancellor (Sir L. Shadwell), in this case, said : " The cases that have been cited in the course of the argument, do not furnish any authority to show that the court has ever exercised any jurisdiction with respect to alimony, except in granting the writ of *Ne exeat regno*. The interference of the court in granting that writ has arisen from the peculiar circumstances that

equity, may admit of some doubt. The truer ground, perhaps, for equitable interference would seem to be, that, although alimony is a fixed sum and not strictly an equitable debt, yet the ecclesiastical courts are unable to furnish a complete remedy, to enforce the due payment thereof; and therefore courts of equity ought to interfere, to prevent the decree from being defeated by fraud.¹ It does not seem, however, that in modern times courts of equity have assumed or acted upon the jurisdiction to this extent.² In cases of alimony it is said that courts of equity will not interfere, unless alimony has been already decreed; and then only to the extent of what is due.³ But, if there is an appeal from the decree, pronouncing alimony, and *à fortiori*, if no alimony has been decreed, and the case is a *lis pendens*, courts of equity will abstain from granting the writ.⁴

§ 1473. In regard to a bill for an account, where there is an admitted balance due by the defendant to the plaintiff, but a larger sum is claimed by the latter, there is not any real deviation from the appropriate jurisdiction of courts of equity:⁵ for matters of account are properly cognizable therein. The writ of *Ne exeat regno* may, therefore, well be supported as a process in aid of the concurrent jurisdiction of courts of equity, and accordingly it is now put upon this intelligible and satisfactory ground.⁶

the Ecclesiastical Court cannot compel the husband to find bail. And if the husband make it appear that he does not intend to leave the kingdom, the court will not grant the writ, although he may not intend to pay what is due from him." See also *Stones v. Cooke*, 8 Sim. R. 321, note (q). *Ante*, § 1425, note (2).

¹ See Cooper, Eq. Pl. Introd. p. 34. In *Read v. Read*, 1 Ch. Cas. 115; *Ex parte Whitmore*, 1 Dick. R. 143; *Shaftoe v. Shaftoe*, 7 Ves. 171; and *Dawson v. Dawson*, 7 Ves. 173, no such ground as compassion is suggested. In New York, where the jurisdiction, as to divorce and alimony, is vested in the Court of Chancery, the chancellor will, *pendente lite*, grant a writ of *Ne exeat republicâ* against the husband. *Denton v. Denton*, 1 Johns. Ch. R. 364, 441; 1 Fonbl. Eq. B. 1, ch. 2.

² *Stones v. Cooke*, 8 Sim. R. 321, note (q); *Ante*, § 1425, and note.

³ *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, 7 Ves. 173; *Haffey v. Haffey*, 14 Ves. 261. See *Angier v. Angier*, Prec. Ch. 497; Cooper, Eq. Pl. ch. 3, p. 149, 150; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (n); *Ante*, § 1422.

⁴ *Coglar v. Coglar*, 1 Ves. Jr. 94; *Haffey v. Haffey*, 14 Ves. 261; *Street v. Street*, 1 Turn. & Russ. 322.

⁵ *Jones v. Sampson*, 8 Ves. 593; *Russell v. Ashby*, 5 Ves. 96; *Amsinck v. Barklay*, 8 Ves. 597; *Dick v. Swinton*, 1 Ves. & Beam. 371; *Stewart v. Graham*, 19 Ves. 313; *Flack v. Holm*, 1 Jac. & Walk. 405, 413; *Porter v. Spencer*, 2 Johns. Ch. R. 169 to 171; *Mitchell v. Bunch*, 2 Paige, R. 606, 617 to 619.

⁶ *Jones v. Alephsin*, 16 Ves. 471; *Howden v. Rogers*, 1 Ves. & Beam. 182 to

§ 1474. As to the nature of the equitable demand, for which a *Ne exeat regno* will be issued; it must be certain in its nature, and actually payable, and not contingent.¹ It should also be for some debt or pecuniary demand. It will not lie, therefore, in a case where the demand is of a general unliquidated nature, or is in the nature of damages.² The equitable debt need not, however, be directly created between the parties. It will be sufficient, if it be fixed and certain. Thus the *cestui que trust* or assignee of a bond, may have a writ of *Ne exeat regno* against the obligor.³

§ 1475. We may conclude what is thus briefly said upon this subject, by stating that the writ will not be granted on a bill for an account in favor of a plaintiff, who is a foreigner out of the realm, because he cannot be compelled to appear and account. And, on the other hand, it may be granted against a foreigner transiently within the country, although the subject-matter originated abroad, at least to the extent of requiring security from him to perform the decree made on the bill filed.⁴

134; *Atkinson v. Leonard*, 3 Bro. Ch. R. 218; *Rice v. Hale*, 5 Cush. 244; *Johnson v. Clendenin*, 5 Gill & Johns. 463; *Blaydes v. Calvert*, 2 Jac. & Walk. 213.

¹ *Anon.* 1 Atk. 521; *Rico v. Gaultier*, 3 Atk. 500; *Shearman v. Shearman*, 3 Bro. Ch. R. 370; *Whitehouse v. Partridge*, 3 Swanst. 377, 378; *Morris v. McNeil*, 2 Russ. R. 604; *Porter v. Spencer*, 2 Johns. Ch. R. 169.

² See *Etches v. Lance*, 7 Ves. 417; *Cock v. Ravie*, 6 Ves. 283. See also *Bridge v. Hindall*, Rep. Temp. Finch, 257; *Beames on Ne Exeat*, 36, 37, 53 to 55; *Whitehouse v. Partridge*, 3 Swanst. 377, 378; *Blaydes v. Calvert*, 2 Jac. & Walk. 212; *Graves v. Griffith*, 1 Jac. & Walk. 646; *Flack v. Holm*, 1 Jac. & Walk. 405, 407; *Smedberg v. Mark*, 6 Johns. Ch. R. 138; *Mattocks v. Tremain*, 3 Johns. Ch. R. 75; *DeRivafinoli v. Corsetti*, 4 Paige, R. 264.

³ *Grant v. Grant*, 3 Russ. R. 598; *Leake v. Leake*, 1 Jac. & Walk. 605.

⁴ *Hyde v. Whitefield*, 19 Ves. 343, 344. See *Done's case*, 1 P. Will. 263. It seems a matter still subject to some little doubt, whether the writ is grantable against a foreigner, who happens to be within the country; although the objection may not prevail, where he is a subject domiciled in a foreign country, or in a colony. See *Beames on Ne Exeat*, p. 44 to 48; *Grant v. Grant*, 3 Russ. R. 598. The case of *Flack v. Holm* (1 Jac. & Walk. 405, 411, 414, 415), affirms the jurisdiction against a foreigner, domiciled abroad, and transiently within the realm, in the case of a balance of account, on which he might have been sued at law, and held to bail. This seems to have been the main ground of the decision. "It is" (said Lord Eldon in that case) "but a civil process to hold a person to bail for an equitable debt, under the same circumstances as those in which, if it were a legal debt, he might be held to bail at law. See also *Howden v. Rogers*, 1 Ves. & Beam. 129. In *Woodward v. Schatzell* (3 Johns. Ch. R. 412), Mr. Chancellor Kent affirmed the jurisdiction in relation to foreigners and citizens of other States, transiently within the territorial jurisdiction of the State of New York; stating,

§ 1476. The Writ of Supplicavit is in the nature of the process at the common law to find sureties of the peace upon articles filed by a party for that purpose.¹ It is, however, rarely now used, as the remedy at the common law is in general adequate, although (as we have seen²) it is sometimes resorted to by a wife against her husband; and in that case it is said, that the Court of Chancery, as an incident, may grant maintenance or alimony to the wife, if she is compelled to live apart from her husband.³

§ 1477. Lord Chief Baron Gilbert has given a full description of the nature and objects of this writ; and it will be sufficient for all the purposes of our present inquiry to state them in his words: "It is granted upon complaint and oath made of the party, where any suitor of the court is abused, and stands in danger of his life, or is threatened with death by another suitor. The contemnor is taken into custody, and must give bail to the sheriff; and if he moves to discharge the writ of supplicavit, the court hears both parties on affidavit, and continues or discharges it, as the case appears, however, that the writ would be discharged upon giving security to abide the decree. See also the same point ruled in *Mitchell v. Bunch*, 2 Paige, R. 606, 617 to 620.

¹ See *Baynum v. Baynum*, Ambler, R. 63, 64. In Lord Bacon's Ordinances there is one regulating the issuing of this writ. Ord. 87, in Beames's Ord. Chan. p. 39. On this Mr. Beames has remarked in his note (144), "This writ, as now issuing, is founded on the statute 21 Jac. I., ch. 8, which must have passed about five years after the making of the present Ordinances, if they really were published on the 29th Jan., 1618, as asserted in the judicial authority of the Master of the Rolls, p. 100. In addition to the authorities cited in the notes subjoined to Heyn's case, the reader may be referred to *Stoell v. Botelar*, 2 Ch. Rep. 68; *Ex parte Gumbleton*, 9 Mod. 222; S. C. 2 Atk. 70; *Hilton v. Biron*, 3 Salk. 248; *Ex parte Lewis*, Mosel. 191; *Ex parte Gibson*, Ib. 198; *Gilb. For. Rom.* 202; *Com. Dig. Chancery*, 4 R., and *Forcible Entry*, D. 16, 17. The *Collec. Jurid.* 193, carries supplicavits so high as the reigns of Hen. VII. and Hen. VIII. when both parties, plaintiff and defendant, were bound over to their good behavior."

² *Ante*, § 1423; *Clavering's case*, 2 P. Will. 202; *Snelling v. Flatman*, 1 Dick. 6; *Stoell v. Botelar*, 2 Ch. R. 68; *Baynum v. Baynum*, Ambler, R. 63, 64.

³ *Ibid.*; *Ball v. Montgomery*, 2 Ves. Jr. 195; *Duncan v. Duncan*, 19 Ves. 396; *Tuncliff's case*, 1 Jac. & Walk. 348; *Dobbyn's case*, 3 Ves. & Beam. 183; *Heyn's case*, 2 Ves. & Beam. 182; *King v. King*, 2 Ves. 578; S. C. Ambler, R. 240, 333; *Baynum v. Baynum*, Ambler, R. 63, 64. An application of this sort was made by a married woman in *Codd v. Codd* (2 Johns. Ch. R. 141), and Mr. Chancellor Kent seems on that occasion to have doubted whether the writ ought now to be granted in chancery, as the remedy at law was complete. But it is difficult, upon the authorities, to maintain this doubt. See Beames's Orders in Chancery, p. 39, note (144).

pears before them. If they order the contemnor to give security for his good behavior, (for this writ is in the nature of a Lord Chief Justice's warrant to apprehend a man for a breach of the peace,) he must do it by recognizance, to be taken before one of the masters of the court, who must be in the commission of the peace. He is to find sureties to be of his good behavior. If he beats or assaults the party a second time, the court will order the recognizance to be put in suit, and permit the party to recover the penalty ; for the recognizance is never to be sued, but by leave of the court. But this proceeding very rarely or never happens. So if any suitor of the court is arrested, either in the face of the court or out of the court, as he is going and coming to attend and follow his cause, (for so far the court does and will protect every man,) upon complaint made thereof, sitting the court, they will send out the tipstaff, and bring in the bailiffs and prisoner into court instantly, sitting the court, and they will order them forthwith to discharge him, or lay them by the heels ; and the plaintiff in the action, upon complaint and oath made thereof, will certainly stand committed. He shall lie in prison till he petitions, submits, and begs pardon, and pays the costs to the other party."¹

§ 1478. We may close this head of exclusive processes, by advertng to certain proceedings, which, although not unknown to the courts of common law, seem, as a matter of right and authority, independent of the consent of parties, to belong exclusively to courts of equity. We refer to the practice in doubtful matters of fact, of directing an issue to be tried at law to ascertain the same ; and, in matters of law, of sending the point for the opinion of a court of law, and then acting upon the final result in either case in the court of equity, directing the issue or opinion. We have already seen the application of the former proceeding to the issue of *devisavit vel non* in bills for the establishment of wills.²

§ 1479. The nature and objects of these proceedings cannot be

¹ Gilbert's *Forum Rom.* p. 202, 203 ; 2 Harrison's *Ch. Pr.* by Newland, ch. 79, p. 563. Clavering's case (2 P. Will. 202), and *Stoell v. Botelar* (2 Ch. Rep. 68), are instances of the actual granting of the writ, under circumstances like those stated by Gilbert, in his *Forum Roman.* p. 202, 203. It is usual to discharge persons committed for want of surety on articles of peace, and on a *supplicavit*, after a year, if nothing new happens, and the threat or danger does not continue. *Baynum v. Baynum*, Ambler, R. 63 ; *Ex parte Grosvenor*, 3 P. Will. 103.

² *Ante*, § 1447, 1464, note (1).

better stated than they are by Mr. Justice Blackstone. "The chancellor's decree," (says he,) "is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the Court of King's Bench, or at the assizes, upon a feigned issue. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is feigned to be brought, wherein the pretended plaintiff declares that he laid a wager of £ 5 with the defendant, that A. was heir at law to B.; and then avers that he is so; and brings his action for the £ 5. The defendant allows the wager, but avers that A. is not the heir to B., and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans, and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause. So, likewise, if a question of mere law arises in the course of a cause, as whether, by the words of a will, an estate for life or in tail is created; or, whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the Court of King's Bench or Common Pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificates the decree is usually founded."¹

§ 1479 a. When the court orders an issue of fact, and a verdict is founded upon the issue in favor of either party, it is not necessarily conclusive upon either party; and, notwithstanding the

¹ 3 Black. Comm. 452, 453.

verdict, the party against whom it is given has a right to proceed in the cause, and to go into evidence in support of his case, notwithstanding the court, upon a motion for a new trial (which the court is at full liberty to entertain), refuses to disturb the verdict. Generally speaking, such a verdict is treated as conclusive between the parties; for persons who have had an ample opportunity of bringing before a jury such evidence as they think proper and material to the case are generally satisfied with the result, at least if the result of the investigation be such as not to lead to an order for a new trial. Still, in point of practice and in point of law, (as has been suggested,) the verdict is not conclusive. But from the inconvenience of proceeding after the verdict, and in opposition thereto, to a hearing of the cause, the court will, as a matter in its discretion, refuse an issue, unless upon an understanding by both parties to abide the result, unless the court should disturb the verdict.¹

¹ *Ansdell v. Ansdell* (4 Mylne & Craig, 449, 454). On this occasion, Lord Cottenham said: "Now, that the verdict founded on the interlocutory application is not conclusive — conclusive in point of law it cannot be, but conclusive, I mean, according to the practice of this court — I apprehend is free from all doubt. It is a matter of extreme importance, undoubtedly, in any subsequent investigation; but it is merely that which it would be at law; namely, a matter of evidence, but not conclusive evidence, between the parties. Of necessity, therefore, the defendants here were at liberty to go into the case which they had made, and, if possible, to raise sufficient doubt in the mind of the court as to whether the result of the former investigation had been so satisfactory as to justify the court in acting upon that finding and that result, without additional and further investigation. It is obvious that this course of proceeding is open to very grave objection and to very great danger; and it will deserve the consideration of those before whom similar causes may come in future, — certainly, if any such cause should come before me, I shall give it my most serious consideration before directing any issue on an interlocutory application, — whether such an issue should be directed, without putting the parties to an undertaking to abide by the result. The mere circumstance of an issue being necessary to enable the court to deal with the interlocutory application, is of itself sufficient to support an order for an injunction, until the parties shall be in a situation to try the facts. A plaintiff can very seldom, if ever, — indeed I know not that he can ever, — be in a situation to render it necessary for him to ask for such an issue. The doubt which directs and is the ground of such an issue assumes that it would be sufficient for his purpose. On the other hand, the defendant may be very deeply interested in having what he asserts to be his rights not interfered with, without the opportunity, at the earliest possible moment, of having those rights put into a course of investigation and trial; and the defendant, therefore, can never complain that the option is tendered to him of submitting to have his rights, if they do exist, suspended by an injunction,

CHAPTER XLII.

BILLS OF DISCOVERY, AND BILLS TO PRESERVE AND PERPETUATE EVIDENCE.

- [* § 1480, 1481. The auxiliary jurisdiction of courts of equity.
- § 1482. Bills of discovery, to perpetuate and to take testimony, *de bene esse*.
- § 1483. Proper grounds for bringing bill of discovery.
- § 1484, 1485. Discovery of facts, or production of books and papers, could not, formerly, be enforced at law.
- § 1486, 1487. Mode of obtaining discovery in civil law.
- § 1488. Jurisdiction maintained unless some ground of exception.
- § 1489. Grounds of exception stated.
- § 1490. Plaintiff must show good title in himself.
- § 1491. May claim to inspect deeds affecting title.
- § 1492. The heir at law, unless in tail, an exception.
- § 1493. Devisee clearly entitled to inspect title-deeds.
- § 1493 a. Must show probable ground of recovery, or defence.
- § 1494. Will not compel discovery in aid of criminal case, &c.
- § 1495. In what courts will aid proceedings.
- § 1496. Will not compel disclosure of confidences.
- § 1497. Or of matters not material.
- § 1498. Arbitrators not compellable to disclose unless charged with misconduct.
- § 1499. Nor party who has no interest.
- § 1500. Unless charged with fraud or misconduct.
- § 1501. Officers of corporations compellable to disclose.
- [§ 1502, 1503. *Bonâ fide* purchasers protected.
- § 1503 a. So also those purchasing under them.
- § 1503 b. Creditor not treated as *bonâ fide* purchaser.
- § 1504. Jointress protected in her equities.
- § 1505. Bills to perpetuate testimony.
- § 1506. This often done in regard to wills.
- § 1507. Objections to such testimony stated.
- § 1508. Only entertained where suit cannot be brought immediately.
- § 1509. Maintained in many cases, where bill of discovery maintainable.
- § 1510. So also in case of *bonâ fide* purchaser.
- § 1511. Plaintiff must have present vested interest.
- § 1512. Decree of court in such cases.
- § 1513. Bills to take testimony *de bene esse*.
- § 1514, 1515. Extent of this jurisdiction.
- § 1516. How publication to be made.]

or of proceeding to an immediate trial, undertaking that the result of that trial, subject to the jurisdiction of the court as to any application for a new trial, shall be conclusive upon the rights of the parties. As at present advised, and according to the opinion I at present entertain, it will be very difficult to induce me, after the experience I have had in this cause, to direct any issue on interlocutory application, without calling on the defendant to treat the result as conclusive of the case on the matter of fact."

[* § 1480. We shall now examine the auxiliary or assistant jurisdiction of courts of equity.]

§ 1481. In a general sense, courts of equity may be said to be assistant to other courts in a variety of cases, in which the administration of justice could not otherwise be usefully or successfully attained. Thus, for example, they become assistant to courts of law, by removing legal impediments to the fair decision of a question depending thereon, by preventing a trustee, lessee, or mortgagee, from setting up an outstanding term, to defeat an ejectment brought to try a title to land, or by suppressing a deed or devise fraudulently obtained, and set up for the same purpose.¹ They are, in like manner, assistant to other courts, by rendering their judgments effectual; as by setting aside fraudulent conveyances, which interfere with them, by providing for the safety of property pending litigation, and by suppressing multiplicity of suits and oppressive actions.² But these topics have already been sufficiently, although incidentally, considered in the preceding pages.³

§ 1482. What we propose particularly to consider in the subsequent discussions, is the remedial process of bills of discovery, bills to perpetuate testimony, and bills to take testimony *de bene esse*, pending a suit; all of which are most important instruments, to be employed as adminicular to the remedial justice of other courts.⁴

§ 1483. It has been already remarked that every bill in equity may properly be deemed a bill of discovery, since it seeks a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case, as propounded in his bill.⁵ But that which is emphatically called in equity proceedings a bill of discovery, is a bill which asks no relief, but which simply seeks the discovery of facts, resting in the knowledge of the defendant, or the discovery of deeds, or writings, or other things, in the possession or power of the defendant, in order to maintain

¹ Fonbl. Eq. B. 1, ch. 1, § 3, note (f); Cooper, Eq. Pl. Introd. p. 33, 34; Id. ch. 33, p. 143; Harrison v. Southcote, 1 Atk. 540; Mitford, Eq. Pl. by Jeremy, 4, 5, 111, 134, 135, 143 to 145; Id. 281.

² Ibid.; Cooper, Eq. Pl. ch. 3, p. 146 to 149, 157; 2 Fonbl. Eq. B. 6, ch. 3, § 1.

³ Ante, § 437 to 439, 825, 829, 852, 859, 861, 903, &c.

⁴ Mitf. Eq. Pl. by Jeremy, 148, 149, 185, 186.

⁵ Ante, § 689; Mitf. Eq. Pl. by Jeremy, 53; Id. 183 to 185. Story on Eq. Pl. 311.

the right or title of the party asking it, in some suit or proceeding in another court.¹ The sole object of such a bill, then, being a particular discovery, when that discovery is obtained by the answer, there can be no further proceedings thereon.² To maintain a bill of discovery it is not necessary that the party should otherwise be without any proof of his case ; for he may maintain such a bill, either because he has no proof, or because he wants it in aid of other proof ;³ [or, if the court can suppose that the discovery can be in any way material to the party in the support or defence of a suit.⁴] But, in general, it seems necessary, in order to main-

¹ *Ante*, § 689 ; Cooper, Eq. Pl. ch. 1, § 4, p. 58 ; *Id.* 60 ; Mitf. Eq. Pl. by Jeremy, p. 8, 53, 148, 306, 307 ; 1 Madd. Ch. Pr. 160. It was said by Lord Hardwicke, in *Montague v. Dudman* (2 Ves. 398), that "A bill of discovery lies here in aid of some proceedings in this court, in order to deliver the party from the necessity of procuring evidence, or to aid in the proceeding, in some suit relating to a civil right in a court of common law, as an action." On the subject of discovery I beg leave to refer the reader to the very able work of Mr. Wigram on Points of Discovery, and of Mr. Hare on Discovery. In these two works the subject seems completely exhausted. See also Story on Eq. Plead. § 34, &c.

² Mitford, Eq. Pl. by Jeremy, 16 ; *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 71. Mr. Fonblanque has made some remarks upon the nature and dangers of this branch of equity jurisdiction, which are certainly entitled to serious consideration. "There is," says he, "no branch of equitable jurisdiction of more extensive application than that which enforces discovery ; and, where kept within its due limits, there is none more conducive to the claims of justice. To compel a defendant to discover that which may enable the plaintiff to substantiate a just, or to repel an unjust demand, is merely assisting a right or preventing a wrong. But, as the most valuable institutions are not exempt from abuse, this power, which ought to be the instrument of justice, may be rendered the instrument of oppression. A plaintiff, by his bill, may, without the least foundation, impute to the defendant the foulest frauds, or seek a discovery of transactions in which he has no real concern ; and when the defendant has put in his answer, denying the frauds, or disclosing transactions (the disclosure of which may materially prejudice his interest), the plaintiff may dismiss his bill with costs, satisfied with the mischief he may have occasioned by the publicity of his charge, or with the advantage which he may have obtained by an extorted disclosure. The rule, which requires the signature of counsel to every bill, affords every security against such an abuse, which forensic experience and integrity can supply ; but it cannot wholly prevent it. The court alone can counteract it ; and, in vindication of its process, must feel the strongest inclination to interpose its authority." 2 Fonbl. Eq. B. 6, ch. 3, § 1, note (a).

³ *Finch v. Finch*, 2 Ves. 492 ; *Montague v. Dudman*, *Ib.* 398 ; *March v. Davidson*, 9 Paige, 580 ; *Manly v. Beekman Iron Company*, *Ib.* 188. It would be otherwise if the bill were for relief as well as discovery. *Ibid.*

⁴ *Peck v. Ashley*, 12 Metc. 478.

tain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought. But these are of rare occurrence.¹

§ 1484. One of the defects in the administration of justice in the courts of common law arises from their want of power to compel a complete discovery of the material facts in controversy by the oaths of the parties in the suit.² And hence, (as we have seen,) one of the most important and extensive sources of the jurisdiction of courts of equity is their power to compel the parties, upon proper proceedings, to make every such discovery.³

§ 1485. Another defect of a similar nature is the want of a power in the courts of common law to compel the production of deeds, books, writings, and other things, which are in the custody or power of one of the parties, and are material to the right, title, or defence of the other.⁴ This defect is also remediable in courts of equity, which will compel the production of such books, deeds, writings, and other things.⁵

§ 1486. The Roman law provided similar means, by the oath of the parties, and by a bill of discovery to obtain due proofs of the material facts in controversy between the parties. There seem originally to have been three modes adopted for this purpose. One was upon a due act of summons to require the party, without oath, to make a statement, or confession generally, relative to a matter in controversy. Another was to require him to answer before the proper judge to certain interrogatories, propounded in

¹ *Moodaly v. Moreton*, 2 Dick. R. 652; *Angell v. Angell*, 1 Sim. & Stu. 83; *Mendes v. Barnard*, 1 Dick. 65; *City of London v. Levy*, 8 Ves. 404.

² 3 Black. Comm. 381, 382; 2 Fonbl. Eq. B. 6, ch. 3, § 1. [In Massachusetts, by a recent statute, either party to any civil action at law may file interrogatories to the adverse party for the discovery of facts or documents material to the support or defence of the suit, to be answered on oath. Stat. 1851, c. 233, § 98; Stat. 1852, c. 312, § 61.]

³ *Ibid.*

⁴ 2 Black. Comm. 382; Com. Dig. *Chancery*, 3 B.

⁵ *Ibid.* [*Both of the defects in legal administration adverted to in the two preceding sections have been removed, by statutes, in England and in most of the American States, since the first publication of these Commentaries; and it is not probable that bills of discovery, or for the production of books and papers, in aid of trials at law, will hereafter be often resorted to.]

the form of distinct articles, which the judge might, in his discretion, order him to answer upon oath. The third was, to require the adverse party to answer upon oath, as to the fact in controversy; the party applying for the answer consenting to take the answer so given upon oath as truth. On this account it was called the decisive or decisory oath; and it admitted of no countervailing and contradictory evidence. In the two former cases other proofs were admissible.¹ *Ubicunque judicem æquitas moverit, æque oportere fieri interrogationem, dubium non est.*² *Voluit Prætor adstringere eum, qui convenitur, ex sua in judicio responsione, ut vel confitendo, vel mentiendo, sese oneret.*³

§ 1487. In the Roman law bills of discovery were called *Actiones ad exhibendum*, when they related to the production of things, or deeds, or documents, in which another person had an interest.⁴ When they required the answer of the party on oath to interrogatories, they were called *Actiones interrogatoriæ*.⁵ It seems that, originally, interrogatory actions might be propounded at any time before suit brought by any party having any interest. But we are informed in the Digest, that, in the time of Justinian, they had become obsolete, and interrogatories were propounded only in cases in litigation. *Interrogatoriis autem actionibus hodiè non utimur, quia nemo cogitur ante judicium de suo jure aliquod respondere. Ideoque minus frequentantur, et in desuetudinem abierunt. Sed tantummodo, ad probationes litigatoribus sufficiunt ea, quæ ab adversâ parte expressa fuerint apud judices, vel in hereditatibus, vel in aliis rebus, quæ in causis vertuntur.*⁶ The Roman law also required that the party seeking a discovery of facts should have a legal capacity to sustain himself in court; and that the discovery should respect some right of action.⁷ It does not seem important further to trace out the analogies of the Roman law on this subject; and, with these brief hints, showing the probable origin of the like proceedings in our courts of equity, we may return to the subject of bills of discovery.

¹ 1 Domat, B. 1, tit. 6, § 5, p. 458, 459; Id. § 5, art. 4, 5.

² Dig. Lib. 11, tit. 1, l. 21.

³ Dig. Lib. 11, tit. 1, l. 4.

⁴ Pothier, Pand. Lib. 10, tit. 4, n. 1 to 7; Id. n. 8 to 30.

⁵ Pothier, Pand. Lib. 11, tit. 1, n. 1 to 24, and note (2).

⁶ Pothier, Pand. Lib. 11, n. 24; Dig. Lib. 11, tit. 1, l. 1, § 1.

⁷ Pothier, Pand. Lib. 11, tit. 1, n. 13, 15.

§ 1488. As the object of this jurisdiction, in cases of bills of discovery, is to assist and promote the administration of public justice in other courts, they are greatly favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction.¹ We shall, therefore, proceed to the consideration of some of the circumstances which may constitute an objection to such bills, leaving the reader silently to draw the conclusion, that, if none of these, nor any of the like nature, intervene, the jurisdiction to compel the discovery sought will be strictly enforced.

§ 1489. The principal grounds upon which a bill of discovery may be resisted, have been enumerated by a learned writer, as follows. (1.) That the subject is not cognizable in any municipal court of justice. (2.) That the court will not lend its aid to obtain a discovery for the particular court for which it is wanted. (3.) That the plaintiff is not entitled to the discovery by reason of some personal disability. (4.) That the plaintiff has no title to the character in which he sues. (5.) That the value of the suit is beneath the dignity of the court. (6.) That the plaintiff has no interest in the subject-matter, or title to the discovery required, or that an action will not lie for which it is wanted. (7.) That the defendant is not answerable to the plaintiff; but that some other person has a right to call for the discovery. (8.) That the policy of the law exempts the defendant from the discovery. (9.) That the defendant is not bound to discover his own title. (10.) That the discovery is not material in the suit. (11.) That the defendant is a mere witness. (12.) That the discovery called for would criminate the defendant.² Some of these grounds of objection are equally applicable to bills asking for relief; and others are so obvious, upon the mere statement of them, as to require no further exposition. It may, however, be proper to unfold the principles, with more particularity, by which a few of them are governed.

§ 1490. In the first place, it must clearly appear upon the face of the bill, that the plaintiff has a title to the discovery which he

¹ 1 Madd. Ch. Pr. 160 to 178; Jeremy on Eq. Jurisd. B. 2, ch. 1, p. 257 to 262.

² Cooper, Eq. Pl. ch. 3, § 3, p. 189, 190. See also Mitf. Eq. Pl. by Jeremy, 185 to 200; Com. Dig. *Chancery*, 3 B. 2; Jeremy on Eq. Jurisd. B. 2, ch. 1, § 3, p. 268, 269; Story on Eq. Plead. § 549 to 604.

seeks; or, in other words, that he has interest in the subject-matter, to which the discovery is attached, capable and proper to be vindicated in some judicial tribunal.¹ A mere stranger cannot maintain a bill for the discovery of the title of another person. Hence, an heir at law cannot, during the life of his ancestor, maintain a bill for a discovery of facts or deeds material to the ancestor's estate; for he has no present title whatsoever, but only the possibility of a future title.² Nor has a party a right to any discovery, except of facts and deeds, and writings necessary to his own title, or under which he claims; for he is not at liberty to pry into the title of the adverse party.³

§ 1491. Even an heir at law has not a right to the inspection

¹ *Brown v. Dudbridge*, 2 Bro. Ch. R. 321, 322; *Cooper*, Eq. Pl. ch. 3, p. 166, 167, 171, 194, 195; *Brownsword v. Edwards*, 2 Ves. 243, 247; *Mitf. Eq. Pl. by Jeremy*, 154, 156, 157, 487; *Story on Eq. Plead.* § 503 to 508.

² *Cooper*, Eq. Pl. ch. 1, § 4, p. 58; *Ibid.* ch. 3, p. 197; *Mitf. Eq. Pl. by Jeremy*, 189 to 191; *Buden v. Dore*, 2 Ves. 445. But see *Metcalf v. Hervey*, 1 Ves. 248; *Ivy v. Kekewick*, 2 Ves. Jr. 679; *Glegg v. Legh*, 4 Madd. R. 193, 208; *Jeremy on Eq. Jurisd. B. 2*, ch. 1, p. 262, 263. Yet it has been held, that, if the discovery sought is of a matter which would show the defendant incapable of having any interest or title, as, for example, whether the defendant, claiming real estate under a devise is an alien, and consequently incapable of holding it, a bill of discovery will lie. *Mitford*, Eq. Pl. by *Jeremy*, p. 197; *Attorney-General v. Duplessis, Parker*, R. 144, 155 to 162. The ground of the decision seemed to be, that the disability of alienage is neither a penalty nor a forfeiture. *Ibid.* 163, 164. And this decision was affirmed in the House of Lords. 5 Bro. Parl. R. '91; S. C. 2 Ves. 286. Lord Hardwicke, however, held a different doctrine in the case of *Duplessis*, and insisted that she was not bound to discover whether she was an alien. *Finch v. Finch*, 2 Ves. 494. Mr. Wigram, in his recent *Treatise on the Law of Discovery* (which did not reach my hands until after the text had been prepared for the press), lays down the following as fundamental propositions on this subject. (1.) It is the right, as a general rule, of the plaintiff in equity, to examine the defendant upon oath, as to all matters of fact, which, being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit. (2.) Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence; with this (if a) qualification, the right of a plaintiff in equity, to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case; and it does not extend to the discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence. *Wigram, Points in Law of Discovery*, p. 21, 22; *Story on Eq. Plead.* § 572 to 574.

³ *Cooper*, Eq. Pl. ch. 3, p. 171, 173, 194; *Sackvill v. Ayleworth*, 1 Vern. R. 105; *Dursley v. Fitzhardinge*, 6 Ves. 260; *Allan v. Allan*, 15 Ves. 131. See *Haskell v. Haskell*, 3 Cush. 540.

of deeds in the possession of a devisee, unless he is an heir in tail; in which latter case he is entitled to see the deeds creating the estate tail, but no further.¹ On the other hand, a devisee is entitled against the heir at law to a discovery of deeds relating to the estate devised.²

§ 1492. The reason of this distinction may not at first view be apparent. But the ground upon which it is asserted is this. The title of an heir at law is a plain legal title. All the family-deeds together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He must make out his title at law, unless there are incumbrances standing in his way, which, indeed, a court of equity would remove, in order to enable him to assert his legal title. But, in a case of an heir in tail, a will is no answer to him; although a will established is an answer to an heir at law. An heir in tail has, beyond the general right, such an interest in the deed creating the entail, that he has a right to the production of it. But an heir at law has no interest in the title-deeds of an estate, unless it has descended to him.³

§ 1493. On the other hand, a devisee, claiming an estate under a will, cannot, without a discovery of the title-deeds, maintain any suit at law. The heir at law might not only defeat his suit, by withholding the means to trace out his legal title, but might also defend himself at law by setting up prior outstanding incumbrances. And thus he might prevent the devisee from having the power of trying the validity of the will at law.⁴ Whether this distinction is well founded, may, perhaps, be thought to admit of some question. That the devisee should, in such a case, be en-

¹ Cooper, Eq. Pl. ch. 1, § 4, p. 58, 59; Ibid. ch. 3, § 3, p. 197, 198; *Shaftsbury v. Arrowsmith*, 4 Ves. 71. In *Shaftsbury v. Arrowsmith* (4 Ves. 71), Lord Rosslyn explained the ground of the doctrine in favor of the heir in tail; that it was removing an impediment which prevented the trial of a legal right. He afterwards added: "Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body, it has been very properly stated, that it may show a title in another person, if the entail is not well barred."

² Cooper, Eq. Pl. ch. 1, § 4, p. 59; Ibid. ch. 3, § 3, p. 197, 198; 2 Fonbl. Eq. B. 6, ch. 3, § 2.

³ *Shaftsbury v. Arrowsmith*, 4 Ves. 67, 70, 71; 2 Fonbl. Eq. B. 6, ch. 3, § 2, and notes (g), (h).

⁴ *Duchess of Newcastle v. Lord Pelham*, 8 Viner, Abrid. *Discovery*, M. pl. 12; 1 Bro. Parl. Cas. 392; Cooper, Eq. Pl. ch. 1, § 4, p. 59.

titled to a discovery, seems plain enough. That the heir at law is not equally well entitled to a discovery of the deeds, under which the estate is claimed, in order to ascertain the extent to which he is disinherited, may not appear quite so plain.¹

§ 1493 a. In the next place, the party must not only show that he has an interest in the subject-matter of the bill, to which the required discovery relates, but he must also state a case, which will, if he is the plaintiff at law, constitute a good ground of action, or if he is the defendant at law, show a good ground of defence, in aid of which the discovery is sought. If it is clear that the action or the defence is unmaintainable at law, courts of equity will not entertain a bill for any discovery in support of it; since the discovery could not be material, but must be useless.² This, however, is so delicate a function that courts of equity will not undertake to refuse a discovery upon such grounds, unless the case is entirely free from doubt. If the point be fairly open to doubt or controversy, courts of equity will grant the discovery, and leave it to courts of law to adjudicate upon the legal rights of the party seeking the discovery.³

¹ It is obvious that the distinction is not satisfactory to Mr. Fonblanque. In 2 Fonbl. Eq. B. 6, ch. 3, § 2, note (g), he says: "And an heir at law, although not entitled to come into equity upon an ejectment bill for possession; yet he is entitled to come into equity to remove terms out of the way, which would otherwise prevent his recovering possession at law; and also has a right to another relief, before he has established his title at law, namely, that the deed and will may be produced, and lodged in proper hands for his inspection; for any heir at law has a right to discover by what means and under what deed he is disinherited." For this he relies upon *Harrison v. Southcote* (1 Atk. 539, 540), where Lord Hardwicke asserts the proposition in the same language; and *Floyer v. Sydenham* (Select Cas. in Ch. 2), which is directly in point. If it were clear, that, if the will were established, the title of the heir would be gone, the objection to a bill of discovery by him might not be unreasonable; for, then, he would have no title to the estate, and, of course, no title to a discovery of the deeds of it. But it may depend upon the very terms of the instrument, as a settlement, or the boundaries stated in different deeds, where the purchase has been of different parcels at different times, whether he is disinherited or not. In such a case, an inspection may be very important to him. See *Cooper, Eq. Pl. ch. 3, § 3, p. 198*; *Aston v. Lord Exeter*, 6 Ves. 288; *Hylton v. Morgan*, 6 Ves. 294.

² *Debigge v. Lord Howe*, cited Mitf. Eq. Pl. by Jeremy, 187, and cited also in 3 Bro. Ch. R. 155; *Wallis v. Duke of Portland*, 3 Ves. Jr. 494; *Lord Kensington v. Mansell*, 13 Ves. 240; *Story on Equity Pleading*, § 319, 556 to 559; *Macaulay v. Shackell*, 1 Bligh, R. (N. S.), 120; *Thomas v. Tyler*, 3 Younge & Coll. 255; *Hare on Discovery*, 43 to 46.

³ *Thomas v. Tyler*, 3 Younge & Coll. 255, 261, 262; *Hare on Discovery*, 43 to

§ 1494. In the next place, courts of equity will not entertain a bill for a discovery, to aid the promotion or defence of any suit which is not purely of a civil nature. Thus, for example, they will not compel a discovery in aid of a criminal prosecution; or of a penal action; or of a suit in its nature partaking of such a character; or in a case involving moral turpitude; for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures.¹

46; Story on Equity Pleading, § 560 to 568. If the bill filed by a defendant at law suggests specific defects in the title of his adversary, the discovery will be granted, although the case made by the bill is not the assertion of an affirmative title in the party bringing the bill. *Smith v. Duke of Beaufort*, 1 Phillips, Ch. R. 209.

¹ Mitford, Eq. Pl. by Jeremy, 186, 193 to 198; Wigram on Discovery (2d edit.), p. 81, § 130, 131 to 134; 1 Madd. Ch. Pr. 173, 174; Cooper, Eq. Pl. ch. 3, § 3, p. 191, 192, 202, 203, 205, 206; *Montague v. Dudman*, 2 Ves. 398; *Thorpe v. Macauley*, 5 Madd. R. 229, 230; *Shackell v. Macaulay*, 2 Sim. & Stu. 79; S. C. 1 Bligh, R. (N. S.), 96; *Claridge v. Hoare*, 14 Ves. 64, 65; *United States v. Bank of Virginia*, 1 Peters, R. 100, 104; *Wallis v. Duke of Portland*, 3 Ves. 494; *Franco v. Bolton*, 3 Ves. 368; *Benyon v. Nettleford*, 2 Eng. Law & Eq. R. 117; *Earl of Suffolk v. Green*, 1 Atk. 450; *King v. Burr*, 3 Meriv. R. 693; *Finch v. Finch*, 2 Ves. 492; *Jeremy on Eq. Jurisd.* B. 2, ch. 1, p. 265 to 267; *Greenleaf v. Queen*, 1 Peters, R. 138; *Horsburg v. Baker*, 1 Peters, R. 232 to 236; *Hare on Discovery*, p. 131 to 135; *Ibid.* 140 to 144; Story on Eq. Plead. § 521 and note, 522 to 526, 553, 575 to 588, 591 to 594, 824, 825, note (1). Lord Hardwicke, in *Montague v. Dudman* (2 Ves. 398), held, that a discovery did not lie to aid a mandamus. In the cases of *Thorpe v. Macauley*, 5 Madd. R. 229, 230, and *Shackell v. Macaulay*, 2 Sim. & Stu. 79; S. C. 2 Russ. R. 550, note, bills of discovery to aid a suit for a libel, were dismissed, as improper, as they partake of a criminal nature. The case of *Shackell v. Macaulay* was carried to the House of Lords, where the decision was affirmed, so far as it authorized a commission to take testimony abroad. 1 Bligh, Rep. (N. S.), 96, 133, 134. In *Wilmot v. Maccabe* (4 Sim. R. 263), the Vice-Chancellor seems to have thought that the decision in the House of Lords in *Shackell v. Macaulay*, justified the court in requiring a discovery in cases of a civil action for libel. Mr. Hare maintains the same doctrine. *Hare on Discovery*, 116, 117. But it does not seem to me, that the decision justifies any such conclusion. See also *Southall v. —*, 1 Younge, R. 308; the case of *Glynn v. Houston*, 1 Keen, R. 329, is directly in point to establish, that a discovery cannot, in a civil action, be compelled of facts, which would subject the party to penal consequences. See also Story on Eq. Plead. § 553, note (3), 575 to 588; *Ibid.* § 597, 598. Where the suit involves penalties, if the plaintiff is competent to waive them, and does waive them in his bill of discovery, it is maintainable. Mitford, Eq. Pl. by Jeremy, 195 to 197, 205, 206; Story on Eq. Plead. § 598. And there are other exceptions; as where the party expressly, by contract, has agreed to discover. *Ibid.*; *Hare on Discovery*, 137 to 139.

§ 1495. In the next place, courts of equity will not entertain a bill for a discovery to assist a suit in another court, if the latter is of itself competent to grant the same relief; for, in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending.¹ Neither will

There is another exception in regard to forfeitures, deserving notice in this place. It is, that a bill of discovery will lie for a disclosure of money lost at play, and of the securities given for it. But this stands, at least, in modern times, upon the provisions of the statute of 9 Anne, ch. 14, giving a bill of discovery. *Rawden v. Shadwell*, Ambler, R. 268, and Mr. Blunt's note (3); *Newman v. Franco*, 2 Anst. R. 519; *Andrews v. Berry*, 3 Anst. R. 634, 635. There are, however, said to be older cases, which support it upon general principles. 14 Viner, Abr. *Gaming*, D. pl. 3, citing *Suckling v. Morley*, Tothill, 84 (this is probably a mistake of the true page, in the edition of 1649; the case will be found at p. 23). See *Ante*, § 302; 1 Fonbl. Eq. B. 1, ch. 4, § 6, note (c). In *Green v. Weaver*, 1 Sim. R. 404, it was held, that a London broker was compellable to make a discovery in aid of an action brought against him by his employer for misconduct, although it subjected him to the penalty of his bond, given for his faithful discharge of his official duties. Another exception (if, indeed, properly considered, it is an exception) is, where the bill seeks a discovery of a fraud, or of fraudulent acts of the defendant; if they do not subject him to criminal proceedings, he is bound to make the discovery. *Janson v. Solarte*, 2 Younge & Coll. 132, 136; *Hare on Discovery*, 140, 142; *Green v. Weaver*, 1 Sim. R. 404, 427, 432. But see *Mitchell v. Koecker*, 11 Beavan, 380. See also *Story on Eq. Plead.* § 589, and note (3); *Ibid.* § 595, 596; *Robinson v. Robinson*, 35 Eng. Law & Eq. R. 558. [Neither is an excuse for non-production of documents, that they will subject the party to a penalty in a foreign country; although that may be his own country. *King of the Two Sicilies v. Wilcox*, 2 Eng. Law & Eq. R. 122.]

¹ *Mitf. Eq. Pl.* by Jeremy, 186; *Cooper, Eq. Pl.* ch. 3, § 3, p. 191, 192; *Dunn v. Coates*, 1 Atk. 288; *Anon.* 2 Ves. 451; *Gelston v. Hoyt*, 1 Johns. Ch. R. 547; *Story on Eq. Plead.* § 555. Mr. Chancellor Kent, in *Gelston v. Hoyt*, 1 Johns. Ch. R. 547, 548, used this expressive language on this point: "If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. If a court of law can compel the discovery, a court of equity will not interfere. And facts, which depend upon the testimony of witnesses, can be procured or proved at law, because courts of law can compel the attendance of witnesses. It is not denied, in this case, but that every fact material to the defence at law can be proved by ordinary means at law, without resorting to the aid of this court. The plaintiffs did not come here for any such aid; and it ought not to be afforded, unless they call for it and show it to be necessary. I should presume, from the bill itself, that every material fact, relative to the ownership of the vessel, could be commanded without resorting to this court; and such trials at law are not to be delayed, and discoveries required, when the necessity of such delay and discovery is not made to appear. This would be perverting and abusing the powers of this court. Unless, therefore, the bill states affirmatively, that the discovery is really wanted for the defence at law; and also shows that the discovery

courts of equity entertain such bills in aid of a controversy pending before arbitrators; for they are not the regular tribunals authorized to administer justice, and, being judges of the parties' own choice, they must submit to the inconveniences incidental thereto.¹ But it constitutes no objection to a bill of discovery that it is to assist proceedings in a court which sits in a foreign country, if in amity with that where the bill is filed; for it is but a just exercise of that comity which the mutual necessities and mutual convenience of all nations prescribe in their intercourse with each other.² Neither does it constitute any objection to a bill of discovery, that the suit which it is to aid has not yet been commenced; for it may be indispensable to enable the party rightly to frame his action and declaration.³

§ 1496. In the next place, no discovery will be compelled, where it is against the policy of the law from the particular relation of the parties.⁴ Thus, for instance, if a bill of discovery is filed against a married woman, to compel her to disclose facts which may charge her husband, it will be dismissed; for a married woman is not permitted to be a witness for or against her husband in controversies with third persons.⁵ Upon the same ground, a person standing in the relation of professional confidence to another, as his counsel or attorney, will not be compelled to disclose the secrets of his client.⁶

might be material to that defence, it does not appear to be reasonable and just that the suit at law should be delayed. The bill is, therefore, defective and insufficient in this point of view." But see *March v. Davidson*, 9 Paige, R. 580; *Story on Eq. Plead.* § 319, where it appears that the doctrine is not correct, as to mere bills for discovery; but at most applies only where the bill is for discovery and relief.

¹ *Cooper*, Eq. Pl. ch. 3, § 3, p. 192; *Street v. Rigby*, 6 Ves. 821; *Story on Eq. Plead.* § 554, 555.

² *Cooper*, Eq. Pl. ch. 3, § 3, p. 191; *Mitf. Eq. Pl. by Jeremy*, 186, note (q); *Daubigny v. Davallen*, 2 Anst. R. 467, 468; *Mitchell v. Smith*, 1 Paige, R. 287.

³ *Moodalay v. Morton*, 1 Bro. Ch. R. 469, 571; S. C. 2 Dick. 652; *Cooper*, Eq. Pl. ch. 3, § 3, p. 192; *Ante*, § 1483; *Story on Eq. Plead.* § 321, 560.

⁴ See a late case on this subject in *Wadeer v. East India Company*, 35 Eng. Law & Eq. R. 283.

⁵ *Cooper*, Eq. Pl. ch. 5, § 3, p. 196; *Le Texier v. Margrave of Anspach*, 5 Ves. 322; S. C. 15 Ves. 159; *Baron v. Grillard*, 3 V. & Beam. 165; *Cartwright v. Green*, 8 Ves. 405, 408; *Story on Eq. Plead.* § 519, 556, 557.

⁶ *Cooper*, Eq. Pl. ch. 5, p. 295, 300; *Mitf. Eq. Pl. by Jeremy*, 284, 288; *Bulstrode v. Letchmere*, 3 Freem. 5; S. C. 1 Ch. Cas. 277; *Parkhurst v. Lowten*, 2

§ 1497. In the next place, no discovery will be compelled, except of facts material to the case, stated by the plaintiff;¹ for, otherwise, he might file a bill, and insist upon a knowledge of facts wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice, or his curiosity, or his spirit of oppression. In such a case, his bill would most aptly be denominated a mere fishing bill. But cases of immateriality may be put far short of such unworthy objects. Thus, if a mortgagor should seek, by a bill of discovery, to ascertain whether the mortgagee was a trustee or not, that would, ordinarily, be deemed an improper inquiry, since, unless special circumstances were shown, it could not be material to the plaintiff, whether any trust were reposed in the mortgagee or not.²

§ 1498. In general, arbitrators are not compellable by a bill of discovery to disclose the grounds on which they made their award; for (it has been said) it would be a great inconvenience to compel them to set forth the particular reasons of their decision; and it would be a discouragement of suitable persons to take upon themselves such an office.³ Perhaps a stronger ground against it is, that the arbitrators are not obliged by law to give any reason for their award; and if they act with good faith, being the judges chosen by the parties, their decision ought, ordi-

Swanst. 194, 216; *Sandford v. Remington*, 2 Ves. Jr. 189. Lord Redesdale (Mitf. Eq. Pl. by Jeremy, 288) says: "If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him, as counsel, attorney, or arbitrator, he may plead, in bar of the discovery, that his knowledge of the fact was so obtained." Mr. Cooper (Eq. Pl. ch. 5, p. 300) adopts similar language. In the cases referred to by Lord Redesdale, I do not find arbitrators mentioned; nor do I find that arbitrators are exempted from disclosing facts which have been stated before them; but only from stating the grounds of their award. See *Gregory v. Howard*, 3 Esp. R. 113; *Habershon v. Troby*, 3 Esp. R. 38; *Slack v. Buchanan*, Peake, R. 5; *Brown v. Brown*, 1 Vern. 158, 159; *Story on Eq. Plead.* § 231, 599 to 603; *Russell v. Jackson*, 8 Eng. Law & Eq. R. 89; *Adams v. Barry*, 2 Y. & Coll. N. R. 107.

¹ See *Finch v. Finch*, 2 Ves. 492; *Gelston v. Hoyt*, 1 Johns. Ch. R. 548, 549; *Story on Eq. Plead.* § 319, 565.

² *Cooper*, Eq. Pl. ch. 3, § 8, p. 198 to 200; *Montague v. Dudman*, 2 Ves. 399; *Mitford*, Eq. Pl. by Jeremy, 191, 192; *Harvey v. Morris*, Rep. Temp. Finch, 214; *Story on Eq. Plead.* § 565.

³ 2 *Cooper*, Eq. Pl. ch. 3, § 3, p. 201; *Steward v. East India Company*, 2 Vern. 380; *Anon.* 3 Atk. 644; *Ante*, § 1457, 1596, note; *Story on Eq. Plead.* § 519, 599, 825, note (1).

narily, to be conclusive.¹ But if they are charged with corruption, fraud, or partiality, they must answer to that.²

§ 1499. In the next place, it is ordinarily a good objection to a bill of discovery, that it seeks the discovery from a defendant who is a mere witness, and has no interest in the suit; for, as he may be examined in the suit as a witness, there is no ground to make him a party to a bill of discovery, since his answer would not be evidence against any other person in the suit.³

§ 1500. There are some exceptions to this rule, as to witnesses, but they are all founded upon special circumstances; and, in general, they do not seem applicable to mere bills of discovery, but only to bills for discovery and relief. Thus, if arbitrators are made parties to a bill to set aside an award, it is a good ground of objection on their part that they are mere witnesses.⁴ But if the bill charges them with corruption, fraud, or other gross misconduct, then they are compellable to make the discovery, and to answer the bill. For they shall never be permitted to deprive the injured party of their evidence, by their own fraud or gross misconduct; and if the case is maintained, they will be held liable for costs.⁵ So an attorney or solicitor, who assists his client in obtaining a fraudulent deed, although a mere witness, may be made a party, and compelled to make a discovery.⁶

§ 1501. Another exception is, the case of making the secretaries, book-keepers, and other officers of a corporation, and, under certain circumstances, even other members of the corporation, parties to bills of discovery and relief, also to bills for discovery merely against the corporation. The ground upon which this exception has been maintained is, that a corporation, being an artificial person, cannot be compelled to make any discovery on oath, but only under its common seal; and, therefore, it cannot make

¹ *Tittenson v. Peat*, 3 Atk. 529; *Ante*, § 1454 to 1456.

² *Ibid.*; *Ives v. Metcalfe*, 1 Atk. 63.

³ *Cooper*, Eq. Pl. ch. 3, § 3, p. 200, 201; *Fenton v. Hughes*, 7 Ves. 287; *Mitf. Eq. Pl.* by Jeremy, 188; *Neuman v. Godfrey*, 2 Bro. Ch. R. 332 to 334; *Cookson v. Ellison*, 2 Bro. Ch. R. 252; *Story on Eq. Plead.* § 234, 262, 323, 519, 570.

⁴ *Story on Eq. Plead.* § 235, 323, 519.

⁵ *Cooper*, Eq. Pl. ch. 3, § 3, p. 262; *Mitf. Eq. Pl.* by Jeremy, 161, 188, 189; *Chicot v. Lequesne*, 2 Ves. 315, 318; *Lingood v. Croucher*, 2 Atk. 395; *Lonsdale v. Littleedale*, 2 Ves. Jr. 451; *Dummer v. Corporation of Chippenham*, 14 Ves. 252; *Story on Eq. Plead.* § 235, 323, 519, 570.

⁶ *Cooper*, Eq. Pl. ch. 3, § 3, p. 201; *Mitford*, Eq. Pl. by Jeremy, 189; *Bennet v. Wade*, 2 Atk. 324; *Bowles v. Stewart*, 1 Sch. & Lefr. 227.

any satisfactory answer, nor be liable for perjury for any false answer. By making the secretary or other officer of the corporation a party, an answer under oath may be obtained from those persons as to the facts within their knowledge. Besides, their answer may enable the plaintiff to arrive at the means of obtaining better information.¹ Some dissatisfaction has been expressed with this mode of reasoning. The first of the grounds is extremely questionable; and, if it were now to be considered for the first time, it would hardly be deemed correct. The latter ground is very singular; for it assigns as the ground of making a person, who is a witness, a defendant, that it is in order to enable the plaintiff to deal better and with more success with the other parties upon the record; a ground wholly repugnant to the general principles of courts of equity on the subject of parties.² The doctrine, however, is now so firmly established, that it is (practically speaking) impossible to overturn it.³

¹ *Wych v. Meal*, 3 P. Will. 311, 312; *Mitf. Eq. Pl.* by Jeremy, 188, 189; *Anon.* 1 Vern. 117; *Story on Eq. Plead.* § 235.

² *Fenton v. Hughes*, 7 Ves. 288 to 291; *Dummer v. Corporation of Chippenham*, 14 Ves. 252. Lord Eldon has commented strongly on the doctrine of this exception in *Fenton v. Hughes* (7 Ves. 289); and the statement in the text is drawn from his judgment in that case.

³ *Ibid.* In the late case of *Glascott v. Copper Miners' Company*, 11 Simons, R. 305, which was a bill for a discovery, by a defendant, in aid of an action at law, Sir L. Shadwell said: "Then the question is, whether such a bill can be sustained? In my opinion there is abundance of authority for sustaining such a bill. It is very remarkable that the second edition of Lord Redesdale's *Treatise*, which was published in the year 1787, contains, word for word, the same passage as we find in the fourth edition, which was published in his lifetime, and with his sanction, and which, therefore, does clearly show, that his lordship did, after the lapse of forty years, entertain the opinion, which he published in the year 1787. Lord Redesdale was a great observer of what took place in this court; and we can hardly suppose that he forgot the cases in which he himself had been engaged as counsel, as he was in *Moodslay v. Morton*, which was heard in 1785. Now, though it may be perfectly true, that the observation made by Sir John Leach, in the case of *Angell v. Angell*, may have contained very good reasons why the demurrer should have been allowed, so far as it was a bill for a commission, still his honor's opinion, supposing it to be right, would be no authority against the proposition which is involved in the decision of that case, namely, that a bill for discovery only may be filed against a corporation and its officers. And it appears to me, that any observations, which were made upon the collateral point concerning the commissions, have nothing at all to do with the question whether a bill of discovery only may be filed against a company and its officers. Then the language of Lord Redesdale, in both the editions to which I have referred, is in the most general form. 'It has

§ 1502. In the next place, a defendant may object to a bill of discovery, that he is a *bonâ fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's claim. We have already had occasion to take notice of this protection which courts of equity throw round innocent purchasers; and that it applies not only to bills of relief, but to bills of discovery.¹ To entitle himself to this protection, however, the purchaser must not only be *bonâ fide*, and without notice, and for a valuable consideration, but he must have paid the purchase-money.² So, he must have purchased the legal title, and not be a mere purchaser

been usual,' says his lordship, 'where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make their secretary, or book-keeper, or other officer, a party.' And if you make any other officer than a secretary or a book-keeper a party, which this language plainly imports, it seems to follow that you may make, not only the secretary, but the governor, and the deputy-governor, &c., and any other person a party, with respect to whom there is an averment that he has, or that he and others have, in their custody, books and papers which relate to the matters in the bill mentioned, and whereby the truth of these matters would appear. And I cannot but think, notwithstanding all that has been said on this subject, that I am actually bound by the authority which I find, which I must take to have been considered as the law, for the length of time from 1787 to 1827, and which I myself have always understood to be the law of the court."

¹ *Ante*, § 64, c. 108 a, 119, 381, 409, 434, 630, 631; *McNeil v. Magee*, 5 Mason, R. 269, 270; *Jeremy on Eq. Jurisd. B. 2, ch. 1, p. 263, 264*; *Cooper, Eq. Pl. ch. 5, p. 300*; *Mitford, Eq. Pl. by Jeremy, 274, 275*. Mr. Butler's note to *Co. Litt. 290 b*, note 1, § 13; *Stanhope v. Earl Varney*, 2 Eden, R. 81.

² *Wood v. Mann*, 1 Sumner, R. 506; *Flagg v. Mann*, 2 Sumner, R. 487; *Ante*, § 64 c; Mr. Butler's note to *Co. Litt. 290 b*, note (1), § 13; *Stanhope v. Earl Varney*, 2 Eden, R. 81; *Willoughby v. Willoughby*, 1 Term. R. 763, 767. In this last case, Lord Hardwicke said: "In the first place, he must be a purchaser for a *price paid* or for a *valuable consideration*. He must be a purchaser *bonâ fide* not affected with any *fraud or collusion*. He must be a purchaser *without notice* of the prior conveyance, or of the prior charge or incumbrance; for *notice* makes him come in *fraudulently*. And here, when I speak of a purchaser for a valuable consideration, I include a mortgagee, for he is a purchaser *pro tanto*. If he has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also take an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost his possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance." *Maundrell v. Maundrell*, 10 Ves. 246, 259, 260, 270; *Jones v. Bowles*, 3 Mylne & Keen, 581, 596, 597, 598.

without a semblance of title ; for even the purchaser of an equity is bound to take notice of, and is bound by, a prior equity ;¹ and between equities, the established rule is, that he who has the prior equity in point of time, is entitled to the like priority in point of right.² But it is not indispensable to protect himself against a bill of discovery, that he should be the purchaser of a legal title. For the rule in equity is, that, if a defendant has in conscience a right, equal to that claimed by the person filing a bill against him, although he is not clothed with a perfect legal title, this circumstance, in his situation as defendant, renders it improper for a court of equity to compel him to make any discovery which may hazard his title.³ It seems that a judgment creditor, proceeding *in invitum*, does not, in the view of a court of equity, stand in that position in which he requires or receives the same favor as a purchaser whose right is enforced through the conscience of the other party.⁴

§ 1503. In short, courts of equity will not take the least step imaginable against an innocent purchaser in such a predicament ; and will, on the other hand, allow him to take every advantage which the law gives him ; for there is nothing which can attach itself upon his conscience, in such a case in favor of an adverse claim.⁵ Where courts of equity are called upon to administer justice upon grounds of equity against a legal title, they allow a superior strength to the legal title, when the rights of the parties are in conscience equal. And, where a legal title may be enforced in a court of ordinary jurisdiction, to the prejudice of an equitable title, courts of equity will refuse assistance to the legal title against the equitable title, when the rights are in conscience equal.⁶ On the other hand, if a plaintiff comes into equity, seek-

¹ Vattier *v.* Hinde, 7 Peters, 252, 271. But see Payne *v.* Compton, 2 Younge, & Coll. 457 ; Story on Eq. Pl. § 604 to 805.

² Fitzsimmons *v.* Ogden, 7 Cranch, 2 ; *Ante*, § 57 *a* ; Boone *v.* Chiles, 10 Peters, R. 177 ; Payne *v.* Compton, 2 Younge & Coll. 457 ; see *Ante*, § 64 *c*, 410, 434, 630, 631.

³ Mitford, Eq. Pl. by Jeremy, 199 ; Story on Eq. Plead. § 603, 604, 604 *a*, 805 ; *Ante*, § 64 *c*, and note.

⁴ Langton *v.* Horton, 1 Hare, R. 547, 563 ; Doe, *dem.* ; Coleman *v.* Britain, 2 B. & Ald. 93 ; Skeeles *v.* Shearly, 8 Sim. R. 153 ; S. C. 3 Mylne & Cr. 112 ; Story on Eq. Pl. § 807 *a*.

⁵ Jerrard *v.* Saunders, 2 Ves. Jr. 458 ; Wood *v.* Mann. 1 Sumner, R. 507 to 509.

⁶ Mitford, Eq. Pl. by Jeremy, 199, 200 ; Wortley *v.* Birkhead, 2 Ves. 573, 574 ; *Ante*, § 415. See, on this point, *Ante*, § 57 *a*, p. 75, 76, and note (2), § 410, note

ing relief upon a legal title, against a *bonâ fide* purchaser of an equitable title, if he is entitled to relief in such a case, (which is perhaps doubtful,) still, he must obtain it upon the strength of his own case, and his own evidence; and he is not entitled to extract from the conscience of the innocent defendant any proofs to support it.¹

§ 1503 *a*. And not only is a *bonâ fide* purchaser for a valuable consideration without notice, protected in equity against a plaintiff seeking to overturn that title; but a purchaser with notice, under such a *bonâ fide* purchaser without notice, is entitled to the like protection. For, otherwise, it would happen, that the title of such a *bonâ fide* purchaser would become unmarketable in his hands, and consequently he might be subjected to great losses, if not utter ruin.²

§ 1503 *b*. The question sometimes arises as to who is to be treated as a *bonâ fide* purchaser in the sense of the rule: and it has been held, that a judgment creditor, by *elegit*, is not entitled to be deemed such; but he takes only such rights in the premises as the judgment debtor rightfully possessed. Thus, for example, a judgment creditor cannot hold an estate subject to an equitable mortgage by an *elegit* executed on the estate of the debtor mortgagor, except subject to such equitable mortgage, although he had no notice of the mortgage at the time of the *elegit*.³ [* And the

(1), 436, 630, 631, note (2). The only recognized exceptions are in favor of a plaintiff against a judgment creditor, holding the estate on his judgment, and in favor of a dowress against an innocent purchaser. *Ibid*. See *Wood v. Mann*, 1 Sumner, R. 507 to 509.

¹ See *Senhouse v. Earl*, 2 Ves. 450. Lord Loughborough, in *Jerrard v. Saunders* (2 Ves. Jr. 458), said: "I believe it is decided that you cannot even have a bill to perpetuate testimony against him" [a purchaser for a valuable consideration without notice]. The case of *Seybourne v. Clifton*, cited 2 Vern. 159, S. C. 1 Eq. Abr. 354, certainly favors that doctrine. But the case was not decided on any such point. And Lord Eldon, in *Dursley v. Fitzhardinge*, 6 Ves. 263, has manifestly doubted it. Mr. Cooper, however, asserts the doctrine on the authority of the other cases. Cooper, Eq. Pl. ch. 1, § 3, p. 56, 57; *Id.* ch. 5, p. 283, 287. See also Mitford, Eq. Pl. by Jeremy, 279, 280; *Bechinall v. Arnold*, 1 Vern. R. 354, and Mr. Raithby's note. Lord Abinger, in *Payne v. Compton*, 2 Younge & Coll. 457, 461, held, that a *bonâ fide* purchaser, for a valuable consideration without notice, was a good defence in equity to a bill by a plaintiff, who was the owner of the legal estate. See also *Wood v. Mann*, 1 Sumner, R. 507 to 509.

² *Ante*, § 57 *a*, 108, 381, 434; *Varick v. Briggs*, 6 Paige, R. 323, 329; *Bennett v. Walker*, 1 West. R. 130; *Jackson v. McChesney*, 7 Cowen, R. 360.

³ *Whitforth v. Guagain*, *The Jurist*, May 4, 1844, p. 374; S. C. 3 Hare, R. 416.

same rule extends to a creditor deriving title under levy of execution.^{1]}

"The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment creditors of George Cooke, whose judgments were entered up after the mortgage to the plaintiffs, and who have since, by means of elegits, obtained actual possession of the lands comprised in the mortgage; and the question between them is, which of the two is in equity to be preferred to the other? In considering that question, I shall here repeat what I have on more than one occasion already said, respecting Lord Cottenham's judgment when this cause was before him, upon motion, namely, that I am satisfied he did not intend, by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide, but intended that it should be reserved. And I, therefore, consider myself not only at liberty, but bound to decide the cause according to my own understanding of the law. Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in *Langton v. Horton*, when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the *cestui que trust* against the judgment creditor of the trustee. The judgment of Lord Cottenham, in *Newlands v. Paynter* (4 Myl. & Cr. 408), is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lysely* (4 Sim. 70), is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was admitted. And, if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of *Williams v. Craddock* (4 Sim. 316), the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants. In the argument of this case, both parties referred to, and drew conclusions from, the proposition, that, in a court of equity, a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will, in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition, thus admitted, and necessarily admitted, by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If

¹ Hart, Leslie, and Warren v. Farmers' & Mechanics' Bank, 33 Vt. R. 252.

[* But see *Danbury v. Robinson*, 1 McCarter, 213.]

§ 1504. Upon the same principle, a jointress is entitled to protect herself against the discovery of her jointure deed, if the party seeking the discovery is not capable of confirming the jointure, or, if being capable, he does not offer by his will to confirm it.¹ If he is capable, and offers to confirm it, the discovery will be granted, as soon as the confirmation is made, but not before. For, otherwise, it might happen, that, after the discovery, his offer might become ineffectual by the intervention of other interests.²

§ 1505. Let us now pass to the consideration of bills to pre-

the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice, under a conveyance, all trusts and all equitable interests of every description must be subject to the judgments against the trustee. For a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the *cestui que trust*; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary *cestui que trust*. Again, it follows conversely, that, if the equitable interest of an ordinary *cestui que trust*, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition that a judgment creditor is a purchaser for value would prove too much for the defendant's purpose. It would affect all equitable interests alike. But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary *cestui que trust*, and other equitable interests (charges, for example, to pay debts and legacies paramount to the title of the debtor), which it was admitted would be preferred in equity,—that the interest of the equitable mortgagee was imperfect,—that of the *cestui que trust* perfect. In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and, in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which, I think, is not), in the one case than in the other." See also *Abbott v. Stratten*, 3 Jones & Lat. 603.

¹ *Mitford*, Eq. Pl. by Jeremy, 199; *Cooper*, Eq. Pl. 197, 208, 284; *Portsmouth v. Effingham*, 1 Ves. 30; *Id.* 430; *Chamberlain v. Knapp*, 1 Atk. 52; *Senhouse v. Earl*, 2 Ves. 450; *Leech v. Trollop*, 2 Ves. 662; *Ford v. Peering*, 1 Ves. Jr. 76.

² *Leech v. Trollop*, 2 Ves. 662.

serve and perpetuate testimony. The object of all bills of this sort is to preserve and perpetuate testimony, when it is in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation.¹ Bills of this sort are obviously indispensable for the purposes of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision; and unless, in the intermediate time, he may perpetuate the proofs of those rights, they may be lost without any default on his side. The civil law adopted similar means of preserving testimony which was in danger of being otherwise lost.²

§ 1506. This sort of bill (as has been remarked by Mr. Justice Blackstone) "is most frequent, when lands are devised by will, away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will verbatim therein, suggesting, that the heir is inclined to dispute its validity; and then the defendant having answered, they proceed to issue, as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery."³

§ 1507. The jurisdiction, which courts of equity exercise to perpetuate testimony, has been thought to be open to great objections, although it seems indispensable for the purposes of public justice. First; it leads to a trial on written depositions, which is deemed (at least in courts of common law) to be much less favorable to the cause of truth, than the *viva voce* examination of witnesses. But, what is still more important, inasmuch as those depositions can never be used until after the death of the witnesses, and are not, indeed, published until after their death, it follows, that, whatever may have been the perjury committed in those depositions, it must necessarily go unpunished. The testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes

¹ Cooper, Eq. Pl. ch. 1, § 3, p. 52; Mitf. Eq. Pl. by Jeremy, 148, 149; Com. Dig. Chancery, R.

² Domat, B. 3, tit. 6, § 3; Dig. Lib. 9, tit. 2, l. 40; Gilb. For. Roman. ch. 7, p. 118, 119; Mason v. Goodburne, Rep. Temp. Finch, 391.

³ 2 Black. Comm. 450.

upon the crime of perjury. It is for these reasons that courts of equity do not generally entertain bills to perpetuate testimony, for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.¹

§ 1508. If, therefore, it be possible, that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, courts of equity will not entertain any bill for the purpose. For the party, under such circumstances, has it fully in his power to terminate the controversy by commencing the proper action; and, therefore, there is no reasonable ground to give the advantage of deferring his proceedings to a future time, and to substitute thereby written depositions for *vivâ voce* evidence. But, on the other hand, if the party who files the bill can by no means bring the matter in controversy into immediate judicial investigation, which may happen when his title is in remainder, or when he himself is in actual possession of the property, or when he is in the present possession of the rights which he seeks to perpetuate by proofs; in every such case, courts of equity will entertain a suit to secure such proofs. For, otherwise, the only evidence which could support his title, possession, or rights might be lost by the death of his witnesses; and the adverse party might purposely delay any suit to vindicate his claims with a view to that very event.²

¹ Angell v. Angell, 1 Sim. & Stu. 83; Duke of Dorset v. Girdler, Prec. Ch. 531, 532; 1 Madd. Ch. Pr. 152, 153; Cann v. Cann, 1 P. Will. 567 to 569.

² Angell v. Angell, 1 Sim. & Stu. 83; Duke of Dorset v. Girdler, Prec. Ch. 531; Dew v. Clarke, 1 Sim. & Stu. 114; Cooper, Eq. Pl. ch. 1, § 3, p. 53 to 55; Com. Dig. *Chancery*, R. These grounds are fully expounded in the case of Angell v. Angell (1 Sim. & Stu. 83), as, indeed, they had been before expounded in the case of The Duke of Dorset v. Girdler, Prec. Ch. 531. From the opinion of the court, in the latter case, the following extract is made, as it exhibits the pith of the whole doctrine: "If one is out of possession, having only right to fishery, or common rent-charge, he who brings such bill ought never to be allowed to do so, but a demurrer to it will be good, because he may and ought first to enter his action, and establish his title at law; otherwise publication not being to pass till after the death of the witness (as in those cases it never does without special order of the court), they may be guilty of the grossest perjury, and yet go unpunished. Besides that, the party, having a remedy at law, the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering the truth. But, if a man is in actual possession, and is only threatened with disturbances by another, who pretends a right, who has no other way in the world to perpetuate the testimony of his witnesses, but by such a bill as this is; for not

§ 1509. As to the right to maintain a bill to perpetuate testimony, there is no distinction whether it respects a title or claim to real estate, or to personal estate, or to mere personal demands; or whether it is to be used as matter of proof in support of the plaintiff's action, or as matter of defence to repel it.¹ But there is this difference between a bill of discovery and a bill to perpetuate testimony, that the latter may be brought in many cases where the former cannot be. Thus, in cases which involve a penalty or forfeiture of a public nature, a bill of discovery will not lie at all. And, in cases which involve only a penalty or forfeiture of a private nature, it will not lie, unless the party entitled to the benefit of the penalty or forfeiture waives it.² But no such objection exists in regard to a bill to perpetuate testimony; for the latter will lie, not only in cases of a private penalty or forfeiture, without waiving it, where it may be waived, as in cases of waste, or of the forfeiture of a lease, but also in cases of public penalties, such as for the forgery of a deed, or for a fraudulent loss at sea.³

§ 1510. There is also, perhaps, another difference between the case of a bill of discovery, and that of a bill to perpetuate testimony, in regard to a *bonâ fide* purchaser for a valuable consideration without notice. We have seen that the former bill is not maintainable against him.⁴ But as the latter asks for no discovery, and only seeks to perpetuate testimony, which might be used at the time, if the circumstances called for it, and an action were

being actually interrupted or disturbed, he can bring no action at law. And in such a case, if their demurrer should be allowed, there is an end of all bills to perpetuate the testimony of witnesses to wills, and such like, wherein the parties pray no relief, nor ought to do, but only a commission for the examination of their witnesses. And yet, even in these cases, if the plaintiff should afterwards be evicted or disturbed, these depositions cannot be made use of, so long as the witnesses are living, and may be had to be examined before a jury." It is said by Mr. Cooper (Cooper, Eq. Pl. ch. 1, § 3, p. 52), that Lord Nottingham, in *Mason v. Goodburne* (Rep. Tem. Finch, 391), decided the first and leading case on this subject. The marginal note in that case is far more full than the report of the judgment. Bills to perpetuate the testimony of the subscribing witness to a will are often brought, where the devisee is in possession, and the heir may afterwards choose to contest its due execution. See *Harris v. Cotterell*, 3 Meriv. 678.

¹ *Earl of Suffolk v. Green*, 1 Atk. 450.

² *Ante*, § 1319, 1320, 1494; Story on Eq. Plead. § 521 to 526, 553, 824.

³ *Earl of Suffolk v. Green*, 1 Atk. 450; Jeremy on Eq. Jurisd. B. 2, § 1, p. 266, 267, ch. 2, § 2, p. 277, 278; *Ante*, § 1494.

⁴ *Ante*, § 1502.

brought, it does not seem open to the same objection. And there is this reason for the distinction, that otherwise the plaintiff might lose his legal rights by the mere defect of testimony, which, if he could maintain a suit, he would clearly be entitled to.¹

§ 1511. It follows, from the very nature and objects of such bills, that the plaintiff, who is desirous of perpetuating evidence, must, by his bill, show, that he has some interest in the subject-matter, and that it may be endangered, if the testimony in support of it is lost.² Courts of equity will not, however, perpetuate testimony in support of the right of a plaintiff, which may be immediately barred by the defendant.³ But if the interest be a present vested one, not liable to such an objection, it is perfectly immaterial how minute that interest may be; or how distant the possibility of its coming into actual possession and enjoyment may be. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is, nevertheless, a present estate, although with reference to chances, it may be worth little or nothing.⁴ On the other hand, although the contingency may be ever so proximate and valuable, yet, if the party has not, by virtue of that, an estate, (as in the case of the heir of a lunatic,) courts of equity will not interfere to perpetuate evidence touching it.⁵

§ 1512. If the bill is sustained, and the testimony is taken, the suit terminates with the examination; and of course, is not brought to a hearing.⁶ But the decretal order of the court granting the commission directs that the depositions when taken, shall remain to perpetuate the memory thereof, and to be used, in case

¹ *Dursley v. Fitzhardinge*, 6 Ves. 263, 264; *Ante*, § 1508, and note; *Gordon v. Close*, 2 Bro. Parl. Cas. 473, 477, 479.

² *Cooper*, Eq. Pl. ch. 1, § 3, p. 52; *Mitf. Eq. Pl. by Jeremy*, 57; *Mason v. Goodburne*, Rep. Temp. Finch, 391; *Dursley v. Fitzhardinge*, 6 Ves. 261, 262; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 449, 451.

³ *Cooper*, Eq. Pl. ch. 1, § 3, p. 53, 54; *Dursley v. Fitzhardinge*, 6 Ves. 260 to 262; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 451, 452.

⁴ *Ibid.*; *Allan v. Allan*, 15 Ves. 136; *Earl of Belfast v. Chichester*, 2 Jac. & Walk. 451, 452.

⁵ *Ibid.*; *Sackvill v. Aleworth*, 1 Vern. 105, 106.

⁶ *Cooper*, Eq. Pl. ch. 1, § 3, p. 52; *Mitford*, Eq. Pl. by Jeremy, p. 51, and note (u); *Hall v. Hoddesdon*, 2 P. Will. 162; *Anon.* 2 Ves. 497; *Anon. Ambler*, R. 237; *Vaughan v. Fitzgerald*, 1 Sch. & Lefr. 316; 3 Black. Comm. 450; *Ante*, § 1506.

of the death of the witnesses, or their inability to travel, as there shall be occasion.¹

§ 1513. There is another species of bills, having a close analogy to that to perpetuate testimony, and often confounded with it; but which, in reality, stands upon distinct considerations. We allude to bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, to be used in suits actually pending in the country where the bills are filed.² There is this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter are, and can be, brought by persons only who are in possession, under their title, and who cannot sue at law, and thereby have an opportunity to examine their witnesses in such suit. But bills to take testimony *de bene esse* may be brought, not only by persons in possession, but by persons who are out of possession, in aid of the trial at law.³ There is also another distinction between them, which is, that bills *de bene esse* can be brought only when an action is then depending and not before.⁴

¹ Rep. Temp. Finch, 391, 392.

² 3 Black. Comm. 438; Gilb. Forum Roman. 140. When depositions which are taken in a suit to perpetuate testimony are required to be used in a trial at law, not under the control of the court, the order is that the depositions be published, and that the officer attend with and produce to the court of law the record of the whole proceedings, and that the parties may make such use of them as by law they can. Attorney-General v. Ray, 2 Hare, R. 518.

³ Cooper, Eq. Pl. ch. 1, § 3, p. 57; 1 Madd. Ch. Pr. 153; Jeremy on Eq. Jurisd. B. 2, ch. 2, § 2, p. 277, 278.

⁴ Angell v. Angell, 1 Sim. & Stu. 83. The case of Phillips v. Carew (1 P. Will. 117) seems to decide, that a bill of this sort might be brought, although no action was pending, and merely in contemplation of an action, where the plaintiff's witnesses were aged or infirm. But in Angell v. Angell, 1 Sim. & Stu. 83, 93, the Vice-Chancellor (Sir John Leach) held an opposite doctrine,—that which is stated in the text. On that occasion he said, referring to the case in 1 P. Will. 117: "The principle of that case, supposing it to be correctly reported, is not, however, very satisfactory. Written depositions, on account of the infirmity which I have before referred to, are never to be received, where, with reasonable diligence, *vivâ voce* testimony may be had; and the circumstance that the witnesses are aged and infirm should be rather a reason for the action being immediately brought, to give the better chance of their living till the trial, than a reason for permitting the action to be infinitely delayed at the pleasure of the plaintiff. Whenever such a case occurs again, the principle of Phillips v. Carew, 1 P. Will. 117, will come to be reconsidered." In the same case he added: "If a bill for a commission to examine witnesses abroad, to be used on a trial at law, were entertained before an action actually commenced, then, inasmuch as it is not pretended that

§ 1514. By the common law, it is well known, that the courts of law have no authority to issue commissions to take the testimony of witnesses *de bene esse* in any case.¹ But courts of equity have been constantly in the habit of exercising such jurisdiction in aid of trials at law, where the subject-matter admits of present judicial investigation, and a suit is actually pending in some court.² They will, for example, upon a proper bill, grant a

there is any time limited within which the future action is to be brought, this consequence might follow; that the plaintiff in the bill, having obtained this written testimony, not given under the sanction of the penalties of perjury, might delay his action until after the deaths of those witnesses for the adverse party resident in this country, and subject to *vivâ voce* examination, whose evidence might be in opposition to this written testimony; and thus the justice of the case might be defeated. On the other hand, no reason of justice, or even of convenience to the party plaintiff in such a bill, requires, that he should be permitted to file it before he has actually commenced his action. The necessary effect of such a bill is, to suspend the trial until the commission is returned, and to secure to him the benefit of his foreign evidence; and all further delay of trial is injustice to the other party. I am, therefore, of opinion, both upon authority and upon principle, that a bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought, is demurrable to, if it do not aver that an action is pending."

¹ Mitford, Eq. Pl. by Jeremy, 149; 3 Black. Comm. 383; *Macaulay v. Shackell*, 1 Bligh, R. (N. S.) 119, 130. This defect has long since been cured in America; and, indeed, the authority given to our courts of common law, to take the depositions of witnesses, both at home and abroad, has been carried to an extent far beyond what has been exercised by courts of equity. A recent statute in England has conferred authority upon the courts of common law to take the depositions of witnesses abroad. See stat. 13 Geo. III. ch. 63, § 40, 44, and stat. 1 Will. IV. ch. 22; 1 Starkie, Evid. 275, 276 (2 Lond. edit. 1833).

² In *Macaulay v. Shackell*, 1 Bligh, R. (N. S.) 119, Lord Eldon said: "The original jurisdiction of granting commissions was under the great seal, because no commission, at one time, could be granted in common-law courts." Lord Eldon, in the same case (p. 130, 131), cited an extract from the reasons of appeal, in the case of *Davie v. Verelst*, in the House of Lords, which contains a full exposition of the grounds of the jurisdiction. It is as follows: "The order appealed from proceeds upon a fundamental maxim in the administration of justice, namely, that both sides are to be heard, and the parties are to be heard by their evidence and witnesses to matters of fact. The end of the order in question, which was for a commission, is to give the respondents an opportunity of bringing over their evidence from a foreign country, to maintain the truth of the justification which they have pleaded. The courts of law pay an attention to *Audi alteram partem*, as far as the powers of a court of law can go, and, therefore, will put off trials upon an affidavit made by the defendant, showing that he has material witnesses abroad, who are expected home in a reasonable time, it not being the fault, but the misfortune, of the party, that his witnesses are not within the reach of the process of

commission to examine witnesses, who are abroad, and who are material witnesses to the merits of the cause, whether the adverse party will consent thereto or not.¹ They will also entertain a bill to preserve the testimony of aged and infirm witnesses, resident at home, and of witnesses about to depart from the country, to be used in a trial at law, in a suit then pending, if they are likely to die before the time of trial may arrive.² They will even entertain such a bill to preserve the testimony of a witness, who is neither aged nor infirm, if he is a single witness to a material fact in the cause.³ This latter case stands upon the same general ground as

the court, whereby their attendance on the trial may be compelled. This reasoning goes only to the putting off the trial, where there are witnesses abroad, who are expected to be here in a reasonable time, and not when the witnesses were not expected to be here, and their testimony was to be sought by sending a commission to them, instead of waiting for their coming home here to be examined. But, where witnesses reside abroad, and cannot, or will not, personally attend in England, the power of the courts of law is at an end, as they have no means of examining witnesses abroad. But the Court of Chancery, having an authority to issue commissions under the great seal for various purposes, and amongst others, for examining witnesses in causes in that court, the suitors, defendants at law, have availed themselves of the power of the Court of Chancery, to come in and supply the failure of justice, by preferring their bills there, containing a state of their case, and of the proceedings at law, with the defendants' misfortune, that their witnesses being resident abroad, and not compellable to appear at the trial, they cannot have the benefit of their testimony; and, therefore, praying, that the court will relieve them against this accident, and grant them a commission for the examination of their witnesses, to the end, that their depositions may be read at law; and, as it would be nugatory to try the causes without evidence, praying, also, that the plaintiff at law may be restrained by injunction from proceeding in the mean time, till the return of the commission. Both the Court of Chancery and of Exchequer, as courts of equity, have always entertained these bills, as belonging to one of their great sources of jurisdiction, the relief against such accidents as are beyond the power of courts of law to aid."

¹ *Moodalay v. Morton*, 1 Bro. Ch. R. 469; *Thorpe v. Macauley*, 5 Madd. R. 218, 231; *Mendizabel v. Machado*, 2 Sim. & Stu. 483; 1 Madd. Ch. Pr. 152; *Angell v. Angell*, 1 Sim. & Stu. 83, 93; *Mitf. Eq. Pl. by Jeremy*, 149; *Jeremy on Eq. Jurisd. B. 2*, ch. 2, § 1, p. 271, 272; *Cock v. Donovan*, 3 Ves. & Beam. 76; *Hind's Pract.* 305; *Devis v. Turnbull*, 6 Madd. 232.

² *Mitford, Eq. Pl. by Jeremy*, 51, 52, and note (y); *Id.* 149, 150; *Cooper, Eq. Pl. ch. 1*, § 3, p. 57; *Jeremy on Eq. Jurisd. B. 2*, ch. 2, § 1, p. 270, 271. If a witness is seventy years old, he is deemed aged within the rule; and the commission goes of course. *Fitzbugh v. Lee*, *Ambler*, R. 65; *Rowe v. —*, 13 Ves. 261, 262; *Prichard v. Gee*, 5 Madd. R. 364.

³ *Angell v. Angell*, 83, 92, 93; *Shirley v. Earl Ferrers*, 3 P. Will. 77, 78; *Pearson v. Ward*, 1 Cox, R. 177; *Hankin v. Middleditch*, 2 Bro. Ch. R. 641, and Mr.

the other ; that is to say, the extreme danger to the party of an irreparable loss of all the evidence, on which he may rely in support of his right in the trial at law ; for that, which depends upon a single life, must be practically treated as being very uncertain in its duration.¹

§ 1515. In regard to commissions to take the testimony of witnesses abroad, although they are grantable in civil actions only ; yet they are not confined to cases purely *ex contractu*, or touching rights of property ; but they are grantable in cases of suits for civil torts, although such torts may also be indictable. Thus, for example, a commission will be granted to take the testimony of witnesses abroad, in order to establish a justification in a civil suit for a libel, although the justification involves a criminal charge against the plaintiff, and the libel may be the subject of an indictment.²

§ 1516. Some confusion exists in the authorities as to the publication of the testimony in the three distinct classes of cases before mentioned : first, on examinations of witnesses *de bene esse*, pending a cause ; secondly, on examinations of witnesses in a bill, merely to prove a will, *per testes*, as it is called, that is, by the subscribing witnesses ; and thirdly, on examinations of witnesses on common bills to perpetuate testimony ; as, for example, to perpetuate the testimony respecting a will, or a deed, or a modus, or the legitimacy of a marriage.³ The true rule as to the publication of the testimony in these several classes of cases is as follows. As to the first, the examinations are not published, but by the consent of the parties, or on a strong case made to the court.⁴ As to

Belt's note ; *Cholmondeley v. Oxford*, 4 Bro. Ch. 157 ; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*). In *Cholmondeley v. Oxford*, 4 Br. Ch. R. 157, a commission was granted to take the depositions of the witnesses, who were sworn to be the only persons who had knowledge of the material facts, without stating their age. When the commission is granted to take the examination of a single witness, the affidavit to obtain it must state that the particular witness knows the fact, and is the only person that knows it. The belief of the person making the affidavit is not sufficient. *Rowe v. —*, 13 Ves. 261. In all other cases an affidavit is required, as, for example, that the witness is seventy years of age, or is in a dangerous state. *Bellamy v. Jones*, 8 Ves. 31 ; *Barton*, Suit in Eq. 53, 54, note.

¹ Mitford, Eq. Pl. by Jeremy, 150 ; *Shirley v. Earl Ferrers*, 3 P. Will. 77.

² Macaulay v. Shackell, 1 Bligh, R. (N. S.) 96, 126, 127, 129.

³ *Harris v. Cotterell*, 3 Meriv. 680 ; *Ante*, § 1506.

⁴ *Ibid.* ; Gilb. For. Roman. 140. As, for example, upon proof that the witness is since dead, or is unable to attend the trial at law. *Webster v. Pawson*, 2 Dick.

the second, they stand on a distinct ground, because none but subscribing witnesses are examined; and they are examined to the question of the sanity of the testator merely, as incidental; and their publication is of course.¹ As to the third, publication is not ordinarily allowed, during the lifetime of the witnesses, because of the dangers incident thereto, there being no limits as to the points to which the witnesses are examined.² But the publication is a matter resting in the sound discretion of the court, upon the special circumstances of the case; and it will be allowed or refused accordingly.³ In this last class of cases (of bills to perpetuate testimony), when the examinations are taken, the case is considered to be at an end; or at least as suspended, until the anticipated action is brought; and then, at a suitable period, an order for the publication thereof may be obtained from the court upon a proper case made, such as the death or absence of the witnesses, or their inability to attend the trial.⁴

540; *Price v. Bridgman*, 1 Dick. 144; *Bradley v. Crackenthorp*, 1 Dick. R. 182; *Gason v. Wordsworth*, 2 Ves. 336, 337; *Dew v. Clarke*, 1 Sim. & Stu. 108; *Gilb. Forum Roman.* 140. If the witness is alive at the time of the trial, and capable of attending, and within the jurisdiction, his deposition cannot be used. If the case be a bill in equity, and the testimony is taken *de bene esse*, and the witness is living and within the jurisdiction when the examinations are to be taken in chief, he must be examined over again as other witnesses. *Gilb. Forum Roman.* 140, 141. See also *Harrison's Pract. by Newland*, p. 277 to 280, edit. 1808.

¹ *Harris v. Cotterell*, 3 Meriv. 678 to 680; *Ante*, § 1506.

² *Barnsdale v. Lowe*, 2 Russ. & Mylne, 142.

³ *Harris v. Cotterell*, 3 Meriv. R. 678 to 680. However, it is said, that there are very few cases in which a publication has ever been ordered during the lifetime of the witnesses. *Barnsdale v. Lowe*, 2 Russ. & Mylne, 142. As to some, in which it has been ordered, doubts have been expressed. *Ibid.*; *Wyatt, Pract. Reg.* 73.

⁴ *Abergavenny v. Powell*, 1 Meriv. R. 433; *Teale v. Teale*, 1 Sim. & Stu. 385; *Morrison v. Arnold*, 19 Ves. 671. In the case of *Morrison v. Arnold* (19 Ves. 671), Lord Eldon used the following language: "The question upon the motion to publish these depositions, the witnesses being still living, is, What is the practice where witnesses have been examined, not *de bene esse*, but upon a different principle, to have their testimony recorded *in perpetuam rei memoriam*; the course being in a suit for that purpose, that, after the examination of the witnesses, there is an end of the cause? It is laid down in the text-books, that, ordinarily, the depositions cannot be published during the lives of the witnesses; and that doctrine appears to be as old as the time of Lord Egerton, who regretted that such was the practice, upon the inconvenience, that, if the facts stated by the witness are false, that cannot be established against him in any species of prosecution; as that fact can only be established by the production of the deposition, which can-

CHAPTER XLIII.

PECULIAR DEFENCES AND PROOFS IN EQUITY.

[* § 1517. General reflections.

§ 1518 – 1521 *b*, 1520 *c*. Bar to proceedings in equity resulting from the statute of limitations, lapse of time, and acquiescence.

§ 1520 *d*. Subject further discussed with reference to late cases.

§ 1522, 1522 *a*. Part performance takes case out of the statute of frauds.

§ 1522 *b*. Acts of part performance discussed with reference to late decisions.

§ 1523. Former recovery or decree, a bar.

§ 1524. Effect of an account stated.

§ 1525. Plea of *bonâ fide* purchase.

§ 1526. Want of proper parties, a defence.

§ 1527. Evidence. Depositions.

§ 1528. Testimony of defendant ; its effect.

§ 1529. Must be responsive to bill.

§ 1530. Rules of civil law similar to those in equity.

§ 1531. Effect of parol evidence.

§ 1532. Conclusion.]

§ 1517. WE have thus reviewed the principal topics of equity jurisprudence, as connected with the three great divisions of its jurisdiction, namely, its concurrent jurisdiction, its exclusive jurisdiction, and its auxiliary jurisdiction. Imperfect as this exposition of it necessarily has been from the vast mass and variety of

not be produced until the witness is dead. That word, *ordinarily*, which is found in most of the books of practice on this subject, struck me as large enough to admit the exercise of a sound discretion by the court ; and it seems to be capable of another construction ; as there are cases, where the depositions may be published, although the witness is not dead ; if, for instance, he is too infirm to travel. The general rule, I am persuaded, is, not to permit the deposition to be read during the life of the witness ; and I think it will appear, that such orders as are to be found proceed upon affidavit that the witness is dead ; and some, after the declaration, that the deposition of the particular witness shall be read, and, with a considerable degree of caution, that the depositions of the other witnesses shall not be read ; affording both affirmative and negative evidence of the practice." He afterwards added, " After considerable research, there is not a single instance, except of a person sick, incapable of travelling, or prevented by accident ; all the orders, but in those excepted cases, stating that the witness is dead. And, though struck with the circumstance, that he swears with considerable security, as the depositions are not to be opened until after his death, I am afraid to make a precedent contrary to all the authorities ; and further, looking at the first will, and what the trustees under it are about, I doubt, whether a bill to perpetuate testimony is, in this particular case, exactly the bill that should have been filed."

the materials, as well as from the intrinsic difficulty of ascertaining, in many cases, the exact limits and boundaries of its operations, enough has been shown to enable the attentive reader to ascertain the general outlines and proportions of the system, and its beautiful adaptations to the general concerns and actual business of human life. He cannot fail to have observed to what an immeasurable extent, beyond the prescribed bounds of the common law, its remedial justice reaches; with what wonderful flexibility it applies itself to all the changing circumstances which require the relief to be modified and adjusted with a nice regard to the rights and interests, and even to the compassionate claims of the adverse parties; and by what a curious, though artificial machinery, it sifts the consciences of the parties, and detects the latent springs of actions, and draws, as it were, from the secret recesses of the heart, its hidden purposes, and its yet questionable designs. He cannot fail to have observed with what deep solicitude and promptitude it interferes in cases of fraud, accident, and mistake; how eager it is to succor the distressed; to assist the infirm; to protect the weak; to guard the credulous against the arts of the cunning and profligate; and to save the rash and inexperienced from the natural effects of their own acts of folly, and their own misguided and violated confidence. He cannot fail to have approved its bold, and sometimes even stern, denunciations against vice and craftiness; its uncompromising support of the purest morality; and its unflinching resistance to oppression and meditated wrong. Above all, he cannot fail to have been struck with that admirable invention of judicial policy, which interposes preventive guards against impending dangers and mischiefs; and which does not, like the slow and reluctant arm of the common law, wait until the destructive blow has been dealt, and then content itself with an attempt to remedy in damages, what may be, in a just sense, incapable of compensation. If, here and there, he shall have seen an artificial doctrine reared up, which it is now difficult to vindicate upon sound reasoning, or public convenience, let him consider, that it occupies but a narrow space in the general system; that it is the necessary result of the different modes of thought, in different ages; and that, if it has the touch of human infirmity in its structure, its very failings lean to virtue's side, and serve, in some degree, to fence in as well as to embarrass, the interests of those who stand in constant need of

the guardianship of the law. Let him also remember the profound remark of Lord Bacon, that there are in nature certain fountains of justice, whence all civil laws are derived, but as streams; yet, that, like as waters do take tinctures and tastes from the very soils through which they run, so do civil laws vary, according to the regions or governments where they are planted, though they proceed from the same fountains.¹ If he should perceive, that even equity jurisprudence has its blemishes and imperfections in its inability to reach some cases of gross injustice, or of violated right and duty, and he should be tempted to utter the lamentation of an eminent jurist of antiquity, that we do not seek to cherish the solid and expressive form of true law and genuine justice; but that we content ourselves with the mere shadow and semblance of it; nay, that even these we do not follow, as it is desirable we should do, since they are drawn from the best examples of nature and truth;² let him also ponder on the consoling truth, so beautifully expressed by the same master-mind, that the wisdom of laws, in stooping to the concerns of human life, must necessarily stop far short of the wisdom of philosophy.³

[* § 1518. Before closing the present work, we shall advert to some defences, and some matters of evidence, which are peculiar to courts of equity.

§ 1519. Where the jurisdiction of courts of equity is concurrent with the courts of law, as in some matters of fraud, and of account, and some others, the statute of limitation is an absolute bar.⁴

¹ Lord Bacon's Works, *Advancement of Learning*, p. 219 (London edit. 1803).

² Sed nos veri juris, germanæque justitiæ, solidam et expressam effigiem nullam tenemus; umbrâ et imaginibus utimur; eas ipsas utinam sequeremur! Feruntur enim ex optimis naturæ et veritatis exemplis. Cic. De Offic. Lib. 3, § 17.

³ Sed aliter leges, aliter philosophi, tollunt astutias. Leges quâtenus manu tenere possunt; philosophi quâtenus ratione et intelligentiâ. Ibid.

⁴ *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 607, 629, 630. In *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 630, Lord Redesdale said: "But it is said, that courts of equity are not within the statutes of limitations. This is true in one respect. They are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language, to say, that courts of equity act merely by analogy to the statutes; they act in obedience to them. The statute of limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, &c., equity, which, in all cases, follows the law, acts on legal titles, and legal de-

§ 1520. But where the jurisdiction is peculiarly equitable, as in regard to mortgages, or the enforcing of judgment liens, and many others of a similar character, equity acts in analogy to the legal bar of the statute. In this class of cases, and in all cases of equitable titles to real estate, courts of equity will apply the period of limitation of legal estates of an analogous character.¹ For instance, if the mortgagee has been in possession twenty years, claiming an absolute title, the right of redemption will be presumed to have been foreclosed. And if the mortgagor has been in possession a like period, without recognizing the mortgage, it will be regarded as paid.² In all such cases the lapse of time is regarded as an absolute bar.³ But equity will often treat a lapse of a less period as a presumptive bar, on the ground of

mands, according to matters of conscience, which arise, and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice according to the means afforded by a court of equity, it follows the law. The true jurisdiction of courts of equity, in such cases, is, to carry into execution the principles of law, where the modes of remedy afforded by courts of law are not adequate to the purposes of justice, to supply a defect in the remedies afforded by courts of law. The law has appointed certain simple modes of proceeding, which are adapted to a great variety of cases. But there are cases, under peculiar circumstances and qualifications, to which, though the law gives the right, those modes of proceeding do not apply. I do not mean to say, that, in the exercise of this jurisdiction, courts of equity may not, in some instances, have gone too far; though they have been generally more strict in modern times. So courts of law, fancying that they had the means of administering full relief, have sometimes proceeded in cases which were formerly left to courts of equity; and at one period, this also seems to have been carried too far. I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for, when the legislature, by statute, limited the proceedings in equity, it must be taken to have contemplated that equity followed the law; and, therefore, it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also." *Ante*, § 1028 a, 1028 b. But see *McKnight v. Taylor*, 17 Peters, R. 197; S. C. 1 Howard, Sup. C. R. 151; *Tatam v. Williams*, 3 Hare, R. 347, 357, 358, 359; *Folly v. Hill*, 1 Phillips, Ch. R. 399.

¹ *Ibid.*; *Miller v. McIntyre*, 6 Peters, 61; *Coulson v. Walton*, 9 Peters, R. 62; *Peyton v. Stith*, 5 Peters, R. 485; *Piatt v. Vattier*, 9 Peters, R. 405, 416, 417, and the other cases cited in note (3) to p. 736; *Boone v. Chiles*, 10 Peters, R. 177; *White v. Parnter*, 1 Knapp, R. 228, 229.

² *White v. Parnter*, 1 Knapp, R. 228, 229; *Grenfell v. Girdlestone*, 2 Younge & Coll. 662, 680; *Dexter v. Arnold*, 3 Sumner, R. 152.

³ *Ibid.*

discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.¹]

¹ Mitf. Eq. Pl. by Jeremy, 269 to 274; 1 Fonbl. Eq. B. 1, ch. 4, § 27, and note (q). It does not seem necessary at this time to cite at large the authorities which establish this doctrine. They are as full and conclusive upon the subject as they can well be, both in England and America. The leading cases on this subject, of the English courts, are *Smith v. Clay*, Ambler, R. 645; *Bond v. Hopkins*, 1 Sch. & Lefr. 413, 428; *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 607, 630 to 640; *Stackhouse v. Barnston*, 10 Ves. 466, 467; *Ex parte Dewdney*, 15 Ves. 496; *Beckford v. Wade*, 17 Ves. 96; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 138 to 152; *Portlock v. Gardner*, 1 Hare, R. 594; *Vigors v. Pike*, 8 Clarke & Fin. 650. In America this subject has been largely discussed, and the same doctrine sanctioned in many cases. See *Kane v. Bloodgood*, 7 Johns. Ch. R. 93; *Dexter v. Arnold*, 3 Sumner, 152; *Decouche v. Savetier*, 3 Johns. Ch. R. 190; *Murray v. Coster*, 20 Johns. R. 576, 582; *Prevost v. Gratz*, 6 Wheat. R. 481; *Hughes v. Edwards*, 9 Wheat. R. 489; *Elmendorf v. Taylor*, 10 Wheat. 168; *Willison v. Watkins*, 3 Peters, R. 44; *Miller v. McIntire*, 6 Peters, R. 61, 66; *Piatt v. Vattier*, 9 Peters, R. 405, 416, 417; *Sherwood v. Sutton*, 5 Mason, R. 143, 145, 146; *McKnight v. Taylor*, 17 Peters, R. 197; S. C. 1 Howard, S. C. R. 151; *Bowman v. Wathen*, 17 Peters, R. 235; S. C. 1 Howard, Sup. Ct. R. 189; *Gould v. Gould*, 1 Story, R. 537; Story on Eq. Pleading, § 813, 814. In *Smith v. Clay*, Ambler R. 645, Lord Camden said: "A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court. Therefore, in *Fitter v. Lord Macclesfield*, Lord North said rightly, that, though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon very apparent error. *Expediit reipublicæ, ut sit finis litium*, is a maxim that has prevailed in this court in all times, without the help of an act of Parliament. But, as the court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year. It was governed by circumstances. But, as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For, when the legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation), to countenance laches beyond the period that law had been confined to by Parliament. And, therefore, in all cases, where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar." In *Bond v. Hopkins* (1 Sch. & Lefr. 429), Lord Redesdale said: "Nothing is better established in courts of equity (and it was established long before this act) than that, where a title exists at law and in conscience, and the effectual assertion of it, at law, is unconscientiously obstructed, relief should be given in equity; and that, where a title exists in conscience, al-

§ 1520 a. It is often suggested that lapse of time constitutes no bar in cases of trust. But this proposition must be received

though there be none at law, relief should also, although in a different mode, be given in equity. Both these cases are considered by courts of equity, as affected by the statute of limitations; that is, if the equitable title be not sued upon within the time, within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title, as would bar him, if his title were solely at law, he shall be barred in equity. But that is all the operation this statute has, or ought to have, on proceedings in equity." In *Cholmondeley v. Clinton*, 2 Jac. & Walk. 141, Sir Thomas Plumer said: "In the courts of equity of this country, the principle has been always, as I shall hereafter show, strongly enforced. They have refused relief to stale demands, even in cases where no statutable limitation existed; and whenever any statute has fixed the periods of limitations, by which the claim, if it had been made in a court of law, would have been barred, the claim has been, by analogy, confined to the same period, in a court of equity." Again he added (p. 151), after citing the cases: "These cases show, first, that courts of equity have, at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands, where the party has slept upon his right, and acquiesced for a great length of time; and, secondly, that, whenever a bar has been fixed by statutes to the legal remedy in a court of law, the remedy in a court of equity has, in the analogous cases, been confined to the same period. I should not have thought it necessary to cite authorities upon points so long and so clearly established, had not the present decision tended, as it appears to me it does, to call them in question; and had it not been of such transcendent importance, that no doubt should exist upon questions so materially affecting the titles to real property." The judgment of Mr. Baron Alderson, in *Grenfell v. Girdlestone*, 2 Younge & Coll. 662, 678 to 681, is very full and able to the same point, of the effect in equity of lapse of time. So is that of Lord Wynford, in *White v. Parnter*, 1 Knapp, R. 226, 228, and the judgment of the Supreme Court of the United States, in *Boone v. Chiles*, 10 Peters, R. 177. See also *McKnight v. Taylor*, 1 Howard, Sup. Ct. R. 161; *Tatam v. Williams*, 3 Hare, R. 347, 357, 358. In this last case, Mr. Vice-Chancellor Wigram said: "In this court there is direct and very high authority for the proposition that a court of equity will not, after six years' acquiescence unexplained by circumstances, or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner. *Barber v. Barber*, 18 Ves. 286; *Ault v. Goodrich*, 4 Russ. 430; *Bridges v. Mitchell*, Gilb. Eq. Rep. 224; *Bunb.* 217; 15 Vin. Ab. tit. Limitation, E. 2, pl. 7, p. 110 (a case spoken of by Lord Eldon, in *Foster v. Hodgson*, 19 Ves. 185, as a case of authority), to which may be added also the case of *Martin v. Heathcote*, 2 Eden, 169, and Lord Henley's note upon that case, *Ibid.* The authority of the case of *Barber v. Barber*, and, consequently, the authority of the other cases is, without doubt, much shaken by the observations of Lord Brougham, in moving the judgment of the House of Lords in the case of *Robinson v. Alexander*, 8 Bligh, N. S. 352; 3 Cl. & Fin. 717. For, notwithstanding Lord Cottenham's remark in *Mirehouse v. Scaife*, 2 Myl. & Cr. 704, to the effect,

with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions, unfavorable to its continuance; in all such cases, a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust, and *à fortiori* it will apply with increased strength to cases of implied or constructive trusts.¹

that the judgment of the House of Lords in any given case does not involve an approbation of all the reasons which each peer may have given for his vote, so as to make those reasons binding upon courts of inferior jurisdiction, it is impossible not to defer to the opinion to which I have adverted, and, perhaps, difficult to explain the judgment of the House of Lords upon any other reasons, notwithstanding the special circumstances of that case. But Lord Brougham, in that case, acknowledged, in the clearest manner, that, whether by analogy to the statute, or for any reason, six years was or was not a bar in that case, it was the duty of a court of equity to consider whether, under circumstances of delay, a decree should be made. In this case it is unnecessary that I should rely upon the cases which have decided that this court will not give relief after six years of delay wholly unaccounted for, inasmuch as in this case it was not six years, but a clear period of thirteen years, which elapsed between the death of Foster and the filing of the bill, and no excuse is given for that delay." *Ante*, § 1028 a, 1028 b, 1520. [* See *Obert v. Obert*, Beasley, Ch. R. 423.]

¹ *Prevost v. Gratz*, 6 Wheat. 481; *Portlock v. Gardner*, 1 Hare, R. 594, 603, 604; *Attorney-General v. Fishmongers' Company*, 5 Mylne & Cr. 16, 17. In this last case, Lord Cottenham said: "It was argued, upon the principle that this court recognizes no limitation of time in cases of trust, that no regard was to be paid, in this case, to the lapse of 400 years, which have passed away since the title of the company appears to have accrued. Such a doctrine would be most dangerous, and might, if acted upon, prove destructive of many of the best titles in the kingdom. If there be no doubt as to the origin and existence of a trust, the principles of justice and the interests of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others; but in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. One of the principal reasons for admitting limitations of suits is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power. Upon this principle, this court has, in many instances, limited the period within which it will exercise its

[§ 1520 b. Where lands are devised to trustees, and an express trust is created for the payment of legacies, the claim of the legatee is not barred by the statute of limitations, and no presumption of payment arises from the lapse of twenty years. But where land is devised subject to the payment of a legacy, and the devisee holds the land for twenty years without recognizing the legacy, a presumption of payment arises. The distinction is based upon the ground that the devisee holds in his own right, but the trustee in the right of the legatee.¹]

[* § 1520 c. And where a *cestui que trust* sought to have an account, of the representatives of the trustees, of rents and profits arising from cottage property, after the lapse of more than twenty years from the sale of such property, the bill was dismissed with costs.² It is here said a court of equity will not allow a dormant claim to be set up, when the means of resisting it, if unfounded, have perished; much less cast upon the defendant the burden of proving such an affirmative, as that forty years ago cottage rents were properly collected, when the witnesses that might have proved the fact are all dead.

§ 1520 d. The personal representative is affected by the delay or acquiescence of the decedent, to the same extent as if it were his own.³ And where the plaintiff had lain by and allowed a trade to go on and expenses to be incurred, for a considerable time, without asking for the interference of the court, even where it was originally a case of nuisance, it was held that he was precluded from redress, although the trade had been gradually increasing.⁴ But acquiescence without full knowledge of the facts cannot affect

power; and it would indeed be strange, if, in cases in which it has not done so, it were altogether to disregard the lapse of time, as applicable to the evidence upon which it is called upon to act." *Wedderburn v. Wedderburn*, 4 Mylne & Cr. 41. But see *Michard v. Girod*, 4 Howard, Sup. Ct. R. 561. [* *Knight v. Bowyer*, 2 De G. & J. 421; *Bridgman v. Gill*, 24 Beavan, 302.

¹ *Watson v. Saul*, 5 Jur. N. S. 404.

² *Bright v. Legerton*, 7 Jur. N. S. 559; *Vyvyan v. Vyvyan*, 30 Beav. 65; s. c. 7 Jur. N. S. 891; *Id.* 3. But it is here said, that waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and, being so, neglects to enforce them.

³ *Hodgson v. Bibby*, 8 Law T. N. S. 266. And the vendee is equally affected by the laches or acquiescence of the vendor, as if it were his own. *Ernest v. Vivian*, 9 Law T. N. S. 785; *Cood v. Cood*, 9 Jur. N. S. 1335.

⁴ *Swaine v. Great Northern Railw. Co.* 9 Jur. N. S. 1196.

the rights of any one.¹ And delay in instituting proceedings, where the parties are members of the same family, is not so strictly regarded as where they are strangers to each other.² And a stronger case of acquiescence is required to disentitle the party to a final than to an interlocutory injunction.³]

§ 1521. Courts of equity not only act in obedience and in analogy to the statute of limitations, in proper cases, but they also interfere in many cases to prevent the bar of the statutes, where it would be inequitable or unjust. Thus, for example, if a party has perpetrated a fraud, which has not been discovered until the statutable bar may apply to it at law, courts of equity will interpose and remove the bar out of the way of the other injured party.⁴ *A fortiori*, they will not allow such a bar to prevail by mere analogy to suits in equity, where it would be in furtherance of a manifest injustice.⁵ Thus, if a party should apply to a court of

¹ *Prideaux v. Lonsdale*, 32 Law J. Ch. 317; S. C. 1 De G. J. & Sm. 433; *Strange v. Fooks*, 4 Giff. 408.

² *Laver v. Fielder*, 9 Jur. N. S. 190.

³ *Johnson v. Wyatt*, 9 Jur. N. S. 1333.]

⁴ *Booth v. Lord Warrington*, 4 Bro. Parl. Cas. 163, by Tomlins; S. C. 1 Bro. Parl. Cas. 445; *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 634; *Phalen v. Clark*, 19 Conn. 421; *South Sea Comp. v. Wymondsell*, 3 P. Will. 143; *Deloraine v. Brown*, 3 Bro. Ch. R. 633, 646, and Mr. Belt's note; Story on Eq. Plead. § 751.

⁵ *Bond v. Hopkins*, 1 Sch. & Lefr. 413, 431; Fonbl. Eq. B. 1, ch. 4, § 27, note (g); *Hovenden v. Lord Annesley*, 2 Sch. & Lefr. 630, 640; *Mayne v. Griswold*, 3 Sandf. S. C. R. 482. In *Bond v. Hopkins*, 1 Sch. & Lefr. 430 to 435, Lord Redesdale made an elaborate exposition of this doctrine. From his opinion on that occasion, the following extract is made: "But it is said, that the bar arising from lapse of time ought not to be removed. Why not, as well as a satisfied term, if used against conscience? But it is contended, that the bar, arising from the statute of limitations, ought not to be removed, because the enactment of the statute is positive. The answer is, the positive enactment has nothing to do with the case. The question is not, whether it shall operate in a case provided for by the positive enactment of the statute; but whether it shall operate in a case not provided for by the words of the act, and to which the act can apply, only so far as it governs decisions in courts of equity; that is, whether it shall prevent a court of equity doing justice according to good conscience, where the equitable title is not barred by lapse of time, although the legal title is so barred. It is admitted, that, in a case where this court may decree possession (supposing the suit instituted in time), it will not be prevented, by the statute of limitations, from doing justice by a direct decree, although, before the time of making that decree, the lapse of time would bar proceedings on a legal title. But it is said, it cannot do justice indirectly; that is, it cannot do justice where it thinks fit to put the ques-

equity, and carry on an unfounded litigation, protracted under circumstances, and for a length of time, which should deprive his adversary of his right to proceed at law, on account of the statute of limitations having, in the intermediate time, run against it, courts of equity would, themselves, supply and administer, within their own jurisdiction, a substitute for that original legal right of which the party had been thus deprived; and, by their decree, give him the fullest benefit of it.¹

tion of title in a train of discussion at law, by directing a trial at law to ascertain facts, and the law arising on those facts; which is only one mean of doing justice used by courts of equity, and a mean used, because the court will not break in on legal proceedings more than is necessary for the purposes of justice, but will suffer the course of the law to proceed as far as with justice it can. It is admitted, even in that indirect mode of administering relief, if a term for years or any other temporary bar be an impediment to justice, it may be put out of the way. There is no difficulty made upon that part of the case. It is admitted, also, that, where the court is to act directly and by itself, it is not bound by the words of the statute, or by the spirit of it, provided the suit in equity is instituted in due time. It should seem to follow (though there were no case) that, when it acts indirectly, it should be no more barred by the statute than when it acts directly. *Barnesly v. Powell*, 1 Ves. 285, is an authority to show, that, if the court could not, from the nature of the case, do justice indirectly, by putting the title in a course of trial in another court, it ought to act upon the matter itself, and give direct relief. But it is clear, that courts of equity have, under the correction of the court of dernier ressort, and with the acquiescence of the legislature, decided on the principles on which the Master of the Rolls' decree is founded, *M'Kenzie v. Powis*, 4 Bro. Ch. 328; *Pincke v. Thornycroft*, 1 Bro. Ch. 289; *S. C. Dom. Proc.* 1784, reported in *Cruise on Fines*, 366; and many other cases. In the first of these cases, the appeal was on the single ground, that the Court of Equity had not set the statute of limitations out of the way. It is evident, that courts of equity had been then in the habit of removing the statute out of the way, for so much time as had run pending the cause in equity. The court of dernier ressort thought, that, from the circumstances of that case, it should be wholly put out of the way." [* See also *Sturgis v. Morse*, 3 De Gex & J. 1; 24 Beavan, 541. In a late case in South Carolina, where the question arose in regard to a mortgage being presumed satisfied in a court of equity, from lapse of time, it was ordered that an action at law be brought, as of the date of the bill, and the question determined in the action upon the securities, the same as any similar action at law. *Gibbes v. Holmes*, 10 Rich. Eq. R. 484.]

¹ *Pulteney v. Warren*, 6 Ves. 73; *The East India Company v. Campion*, 11 Bligh, R. 158, 186, 187. Upon this last occasion Lord Chancellor Cottenham said: "The case of *Pulteney v. Warren*, which was urged at the bar on behalf of the respondent, and which I had occasion lately to consider, together with several others, established only this principle, that, where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances, and for a length of time, which deprives his adversary of his legal rights, the

§ 1521 *a*. The question often arises, in cases of fraud and mistake, and acknowledgments of debts, and of trusts and charges on lands for payment of debts, under what circumstances, and at what time, the bar of the statute of limitations begins to run. In general it may be said, that the rule of courts of equity is, that the cause of action or suit arises when, and as soon as, the party has a right to apply to a court of equity for relief.¹ In cases of fraud or mistake, it will begin to run from the time of the discovery of such fraud or mistake, and not before.² [* But to excuse one from instituting proceedings in equity on the ground of the cause of action having been concealed, it is not sufficient to show

Court of Equity considers, that it should itself supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party, so prosecuting an unfounded claim has deprived his adversary. It was upon that principle, that Lord Eldon made the order in *Pulteney v. Warren*, because there a party had, by litigation, improperly deprived his opponent of his legal remedy. It is for such reason that a court of equity will give a party interest out of the penalty of a bond, where, by unfounded litigation, the obligor has prevented the obligee from prosecuting his claim, at the time when his legal remedy was available. Upon that principle it is, that when a party, by unfounded litigation, has prevented an annuitant from receiving his annuity, the court will, in some cases, give interest upon the annuity. All those cases depend upon the same principle of equity." *Ante*, § 1316 *a*.

¹ *Whalley v. Whalley*, 3 Bligh, R. 1. [* In *Imperial Gas-Light Co. v. London Gas-Light Co.* 10 Exch. R. 39, the rule at law is recognized, that no concealment, however fraudulent, will hinder the operation of the statute. Equity, in giving relief in such cases, must do it solely upon the principle of relieving against fraud.]

² *Brookshank v. Smith*, 2 Younge & Coll. 68. In this case, Mr. Baron Alderson said: "Then, is the statute of limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind courts of equity; but they adopt it as a rule, to assist their discretion. In cases of fraud, however, they hold, that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this, courts of equity differ from courts of law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud. Here, therefore, the statute was not applicable, for the mistake was first discovered within six years before the filing of the bill. I think, therefore, that the decree should be for the plaintiffs, but without costs; and, as they have offered to take the £ 1,000, which is the whole of the stock that remains, I think they should be bound by that offer." See also *Blair v. Browley*, 5 Hare, R. 542; *S. C.* 2 Phillips, Ch. R. 354; *Hough v. Richardson*, 3 Story, R. 659. [Ignorance of the evidence by which the fraud can be established in court will not prevent the commencement of the legal bar. It commences from the time of the knowledge of the fraud. *Parham v. McCrary*, 6 Rich. Eq. R. 140.]

that the party was in such an imbecile and uncultivated condition of mind, that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered it. The court cannot undertake to estimate the chance, which the state of mind and education of a man may afford of his making such a discovery, and is therefore compelled to assume that every one, not actually a lunatic, is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary. It was, therefore, held, that a suit could not be maintained to set aside the compromise of an action to recover large estates, made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect, that, though cognizant of all the facts, it was necessarily a concealed fraud as to him.¹ But, no doubt, under some circumstances, the ignorance, or stupidity of the party may be an important element in a question of fraud and imposition.] And an acknowledgment of a debt or judgment, to take the case out of the statute of limitations, or bar by lapse of time, must be made, not to a mere stranger, but to the creditor, or some one acting for him, and upon which the creditor is to act or confide.² A general direction in a will of personal estate, to pay debts, will not stop the running of the statute of limitations, or, if the bar has already attached, remove it.³ The same rule is equally applicable to the case of a devise or charge upon real estate for the payment of debts. In no case will it take the debt out of the operation of the statute of limitations, and prevent the running of the statute.⁴ But a direction, to pay certain scheduled debts out of a particular fund of personal estate, will take these debts, to the extent of the

¹ [* *Manby v. Bewicke*, 3 Kay & J. 342. See also *Bridgman v. Gill*, 24 Beavan, 302; *Smith v. Acton*, 26 Beavan, 210; *Cox v. Dolman*, 2 De G. M. & G. 592. See *Oldham v. Oldham*, 5 Jones, Eq. R. 89; *Franklin v. Ridenhour*, Id. 420.]

² *Grenfell v. Girdlestone*, 2 Younge & Coll. 662.

³ *Freake v. Cranefeldt*, 3 Mylne & Craig, 499.

⁴ *Freake v. Cranefeldt*, 3 Mylne & Craig, 499, 502; *Burke v. Jones*, 2 Ves. & B. 275; *Scott v. Jones*, 4 Clark & Fin. 382; *Fergus v. Gore*, 1 Sch. & Lefr. 107; *Hargreaves v. Michell*, 5 Madd. R. 326; *Hughes v. Wynne*, 1 Turn. & Russ. 307; *Rendell v. Carpenter*, 2 Younge & Jerv. 484. But see *Crallan v. Oulton*, 3 Beavan, R. 1, 6, 7. [* It seems to be the present well-recognized doctrine of the English chancery, that debts secured by a charge on real estate, as by a devise conditioned that the devisee shall pay all the testator's debts, are not affected by the statute of limitations. *Blower v. Blower*, 5 Jur. N. S. 33.]

fund, out of the statute of limitations, and prevent its running.¹ And the like doctrine would probably be applied to cases of trust, or charges upon real estate for the payment of scheduled debts. If the statute has begun to run in the lifetime of the testator, it will continue to run after his death, and will not cease to run during the period which may elapse between his death and the time at which a personal representative is constituted.²

[* § 1521 *b*. It seems to be a settled rule, both at law and in equity, that an indorsement upon a promissory note, or other written evidence of debt, in order to take the case out of the statute of limitations, if made by the creditor, or holder, must be shown to have been made before the statute bar took effect. This point is discussed at length in a late case³ by Lord Justice Turner. The cases are there extensively revised by him. And where one, indebted upon three promissory notes, was applied to for payment on account of interest, and paid £ 5; and at this time two of the notes were barred by the statute of limitations; it was held that the payment must be considered as made exclusively upon the note not barred, and that its effect was to prevent the operation of the statute as to that note.⁴ In matters of account, in order to remove the bar of the statute of limitations, it is not requisite that there be an acknowledgment that a debt is actually due; it is sufficient that there be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found against the party.⁵ It has been held that an entry in the debtor's books of account with the creditor, crediting interest upon a debt,

¹ *Williamson v. Naylor*, 3 Younge & Coll. 208, 210, note.

² *Freaker v. Cranefeldt*, 3 Mylne & Craig, 499; *Scott v. Jones*, 4 Clark and Finnely, R. 382. It seems that in England it is in the discretion of the executor or administrator, under ordinary circumstances, to plead the statute of limitations to a debt due by his testator, or intestate, or not; and if he acts *bonâ fide* and reasonably in not pleading it, and pays the debt, the payment will be good. *Norton v. Frecker*, 1 Atk. 523; *Castleton v. Fanshaw*, Prec. Ch. 100; *Ex parte Dewdney*, 15 Ves. 498; *Shewen v. Vanderhorst*, 1 Russ. & Mylne, 349; S. C. 2 Russ. & Mylne, 75; 2 *William's Law of Executors*, p. 1282, 1283 (2d edit.). A different rule prevails in some of the American States; and the executor or administrator is not allowed to pay debts barred by the statute.

³ [* *Briggs v. Wilson*, 5 De G. M. & G. 12. See also *Hayes v. Morse*, 8 Vt. R. 316.

⁴ *Nash v. Hodgson*, 6 De G. M. & G. 474; S. C. Kay, 650; *Spickernell v. Hotham*, Id. 669.

⁵ *France v. Simpson*, Kay, 678. See also *Edwards v. Janes*, 1 Kay & J. 534.

from time to time, is not sufficient to remove the bar of the statute of limitations.¹ But it would not require much latitude of construction to treat the fact of such credits, as equivalent to a payment of interest, so far as a recognition of the debt is concerned. A devise in trust to pay the debts of the devisor will remove the bar of the statute of limitations.² But payments made by a receiver in a suit, but which were not authorized by the order appointing him, will not take the case out of the statute of limitations.³ An acknowledgment to take the case out of the statute of limitations must be made to the creditor or his agent.⁴]

§ 1521 *c*. It has been held at law, that, where there is a joint contract, which is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased party, by acknowledgment of the debt or otherwise, to take the case out of the statute of limitations against the survivor.⁵ How far the principle, upon which this doctrine has been held, can be applied to the right which a creditor has, in equity, against the estate of a deceased party, and how far the equitable right, which the creditor of joint and several debtors may have, to avail himself of the equities subsisting between the debtors, may be affected by agreements among the debtors themselves, do not appear to be points clearly settled, and, therefore, will deserve consideration whenever they shall arise.⁶

§ 1522. Upon similar grounds of fraud, although the statute of

¹ *Jackson v. Ogg, Johnson*, 397.

² *Moore v. Petchell*, 22 Beavan, 172; *Humble v. Humble*, 24 Beavan, 535.

³ *Whitley v. Lowe*, 25 Beavan, 421.

⁴ *Fuller v. Redman*, 26 Beavan, 614. See *Pendleton v. Rooth*, 5 Jur. N. S. 840, where it is decided, that the acknowledgment of the mortgagee of the title of the mortgagor, after twenty years' possession, restores the right of redemption, and converts what had become realty into personalty; and that the tenant in tail was competent to make such acknowledgment. The acknowledgment of the executor of there having been a debt due from the testator, is sufficient to prevent the debt being barred. *Moodie v. Bannister*, 5 Jur. N. S. 402. But where the administrator pays a debt presumed to be paid, from lapse of time, he is bound to show it was not paid, in order to charge the estate. *Barnawell v. Smith*, 5 Jones, Eq. R. 168. It is held, in *Wright v. Eaves*, 10 Rich. Eq. R. 582, that acknowledgments of the mortgagor of the existence of the debt, sufficient to revive the debt, will rebut all presumption of release of title in favor of a purchaser from the mortgagor, who had been more than twenty years in possession of the premises.]

⁵ *Atkins v. Tredgold*, 2 Barn. & Cressw. 23; *Slater v. Lawson*, 1 Barn. & Adolph. 396.

⁶ *Crallan v. Oulton*, 3 Beavan, R. 1, 7.

frauds is, ordinarily, a good bar, both at law and in equity, to a suit on a parol contract respecting lands; yet, if there has been any act of part-performance, that will, in equity, avoid the operation of the statute; for, otherwise, it would become an instrument of fraud for designing parties.¹ The like principle applies to cases of judgments and decrees, which have been procured by fraud, and are set up to defeat the rights of innocent persons.²

[*§ 1522 *a*. It is upon the ground of part-performance, and to prevent fraud, that the courts of equity are enabled to treat an absolute deed, given to secure a debt, as a mortgage, where the condition of defeasance rests in parol merely.³ And the American cases rest upon the same ground, although the point is not so distinctly brought out, by the judges, in illustrating their judgments. The leading case in this country is put upon the ground of fraud merely, in attempting to pervert a loan into a sale.⁴ The other cases have followed mainly the same ground of argument.⁵ But it is obvious, that, where the grantor continues in the occupancy and use of the premises, as owner, taking the products and making improvements, which but for the deed being a mere mortgage would be a naked tort, and this is acquiesced in by the grantee, through a course of years, it is but fair and just to treat this as part-performance, and sufficient to take the case out of the operation of the statute of frauds, in equity, and thus to charge the party with fraud, who subsequently attempts to put a different construction upon the contract.

§ 1522 *b*. It is said in the very recent case of *Price v. Salisbury*,⁶ by Lord Romilly, Master of the Rolls, that in order to justify a decree for specific performance, on the ground of part-performance, there must be no uncertainty, the terms of the agreement must be plainly and distinctly shown, and also that the part-performance had express reference to these terms. One changing his place of business to a particular house, with the parol assurance

¹ *Ante*, § 759, 760.

² Cooper on Eq. Pl. ch. 5, p. 266, 267, 271; Mitford, Eq. Pl. by Jeremy, 265 to 268.

³ [**Lincoln v. Wright*, 5 Jur. N. S. 1142.

⁴ *Strong v. Stewart*, 4 Johns. Ch. R. 167.

⁵ *Wright v. Bates*, 13 Vt. R. 341; *Baxter v. Wiley*, 27 Vt. R. 276; *Lee v. Manhattan Co.* 1 Paige, 48, 77. This subject is thoroughly examined, and the cases cited, in *Leading Cases in Equity*, Vol. 3, p. 625, 626, *et seq.* (3d edit.).

⁶ 9 Jur. N. S. 838; S. C. 32 Beav. 446.

that he might occupy it during life rent-free; and continuing to reside there, making occasional repairs of the ordinary kind, except building a new staircase and putting a new roof upon an out-house, was held no sufficient part-performance to warrant a decree of specific performance.¹ Marriage in faith of a parol settlement is not such part-performance as will enable a court of equity to regard the case as not within the operation of the statute of frauds.² Acts of part-performance, by the party sought to be charged, will not remove the operation of the statute.^{3]}

§ 1523. A former decree in a suit in equity between the same parties, and for the same subject-matter, is also a good defence in equity, even although it be a decree, merely dismissing the bill, if the dismissal is not expressed to be without prejudice.⁴ Here, courts of equity act in analogy to the law in some respects, but not in all; for the dismissal of a suit at law, or even a judgment at law, is not, in all cases, a good bar to another action.

§ 1524. An account stated constitutes, also, a good bar to a bill in equity to account, although it will constitute no bar to an action at law for the same subject-matter.⁵ But then (as we have seen) equitable circumstances may be shown, which will remove the whole effect of the bar.⁶

§ 1525. The plea of a purchase for a valuable consideration, without notice, is also a defence peculiarly belonging to courts of equity, and is utterly unknown to the common law. But, upon this, sufficient has already been said, in the antecedent portions of these commentaries.⁷

§ 1526. The want of proper parties to a bill is also a good defence in equity, at least, until the new parties are made, or a good reason shown why they are not made. At law, a plea of the like nature is sometimes a good defence in bar, and is sometimes only a matter in abatement. But the plea in equity is of a far more extensive nature than at law; and it often applies, where the objection would not, at law, have the slightest foundation. The

¹ *Millard v. Harvey*, 10 Jur. N. S. 1167.

² *Caton v. Caton*, 12 Jur. N. S. 171.

³ *Ibid.*]

⁴ *Cooper*, Eq. Pl. ch. 5, p. 269 to 271; *Mitford*, Eq. Pl. by Jeremy, p. 237 to 239.

⁵ *Ante*, § 523; *Cooper*, Eq. Pl. ch. 5, p. 277; *Mitf. Eq. Pl. by Jeremy*, 259, 260.

⁶ *Ibid.*

⁷ *Ante*, § 57 a, p. 75, and § 108, 139, 165, 381, 409, 434, 436, 1502, 1503.

direct and immediate parties, having a legal interest, are those only who can be required to be made parties in a suit at law. But courts of equity frequently require all persons, who have remote and future interests, or equitable interests only, or who are directly affected by the decree, to be made parties; and they will not, if they are within the jurisdiction, and capable of being made parties, proceed to decide the cause without them. Hence, it is, that, in courts of equity, persons, having very different, and even opposite interests, are often made parties defendant. It is the great object of courts of equity to put an end to litigation; and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject-matter in controversy.¹ Hence, the general rule in equity is, that all persons are to be made parties who are either legally or equitably interested in the subject-matter and result of the suit, however numerous they may be, if they are within the jurisdiction; and it is, in a general sense, practicable so to do. There are exceptions to the rule, and modifications of it, which form a very important part of the practical doctrines of courts of equity on the subject of pleading. But they properly belong to a distinct treatise on that particular subject.²

§ 1527. In the next place, in relation to evidence peculiar to courts of equity. In general, it may be stated, that the rules of evidence are the same in equity as they are at law;³ and that questions of the competency or incompetency of witnesses, and of other proofs, are also the same in both courts. Without advert-
ing to minor differences and distinctions, there are, however, two respects, in which courts of equity differ from courts of law, in the modes of obtaining and acting upon evidence. In the first place, courts of law, unless under very special circumstances, do not allow of the evidence of witnesses by written depositions, but require it to be given *vivâ voce*. On the other hand, almost all testimony is positively required, by courts of equity, to be by written deposition; the admission of *vivâ voce* evidence, at the hearing,

¹ Cooper, Eq. Pl. ch. 1, p. 34; Mitf. Eq. Pl. by Jeremy, 163, 164.

² See Cooper on Eq. Pl. ch. 1, § 2, p. 21 to 42; Mitf. Eq. Pl. by Jeremy, 163 to 181; West v. Randall, 2 Mason, R. 190 to 196; Story on Eq. Plead. § 72 to 238.

³ Manning v. Lechmere, 1 Atk. 453; Glynn v. Bank of England, 2 Ves. 41; Gilbert's Forum Roman. 147.

being limited to a very few cases, such as proving a deed or a voucher referred to in the case.¹

§ 1528. But a more important difference, in the next place, is, that, in courts of law, the testimony of the parties themselves in civil suits is, ordinarily, if not universally, excluded. But, in courts of equity, the parties, plaintiffs as well as defendants, may reciprocally require and use the testimony of each other upon a bill and cross-bill for the purpose. And in every case, the answer of the defendant to a bill filed against him upon any matter stated in the bill, and responsive to it, is evidence in his own favor.² Nay, the doctrine of equity goes farther; for not only is such an answer proof in favor of the defendant, as to the matters of fact, of which the bill seeks a disclosure from him; but it is conclusive in his favor, unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness, corroborated by other circumstances and facts, which give to it a greater weight than the answer, or which are equivalent in weight to a second witness.³ Or, to express the doctrine in another form, it is an invariable rule, in equity, that where the defendant, in express terms, negatives the allegations of the bill, and the evidence is only of one per-

¹ 2 Madd. Ch. Pract. 330, 331; *Higgins v. Mills*, 5 Russ. R. 287; 2 Daniel, Chan. Pract. 441 to 446.

² In like manner, courts of equity admit the testimony of certain persons to facts, which, perhaps, they would not be, or might not be, competent to prove in a court of law. Thus, an accounting party may, in equity, discharge himself, by his own oath, of small sums under forty shillings, provided that they do not, in the whole, exceed the sum of one hundred pounds. 2 Fonbl. Eq. B. 6, ch. 1, § 1, and note (c); *Remsen v. Remsen*, 2 Johns. Ch. R. 501. See also *Holstcomb v. Rivers*, 1 Ch. Cas. 127, 128; *Peyton v. Green*, 1 Ch. Rep. 78 [146]; *Anon.* 1 Vern. R. 283; *Marshfield v. Weston*, 2 Vern. 176; S. C. 1 Eq. Abr. 11, pl. 14; *Whicherly v. Whicherly*, 1 Vern. 470; *Morely v. Bonge*, Mosel. R. 252. But he will not be allowed as plaintiff, to charge another person in the same way upon his own oath. *Everard v. Warren*, 2 Ch. Cas. 249; 2 Fonbl. Eq. B. 6, ch. 1, § 1; *Marshfield v. Weston*, 2 Vern. 176; S. C. 1 Eq. Abr. 11, pl. 14. I have said, that, perhaps the same evidence might not be allowed at law. Mr. Fonblanque (*ubi supra*) intimates, that it would not be. But Lord Hardwicke, in *Robinson v. Cumming* (2 Atk. 410), suggested the contrary.

³ *Pember v. Mathers*, 1 Bro. Ch. R. 52; *Walton v. Hobbs*, 2 Atk. 19; *Janson v. Rany*, 2 Atk. 140; *Arnot v. Biscoe*, 1 Ves. 97; *Cooth v. Jackson*, 6 Ves. 40; *East India Company v. Donald*, 9 Ves. 275, 283; *Pilling v. Armitage*, 12 Ves. 78; *Cooke v. Clayworth*, 18 Ves. 12; *Savage v. Brocksopp*, 18 Ves. 335; *Clark's Executors v. Van Reimsdyk*, 9 Cranch, 160; *Smith v. Brush*, 1 Johns. Ch. R. 459, 462; *Flagg v. Mann*, 2 Sumner, R. 489.

son, affirming, as a witness, what has been so negatived, the court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill.¹ The reason upon which the rule stands is this. The plaintiff calls upon the defendant to answer an allegation of fact, which he makes; and thereby he admits the answer to be evidence of that fact. If it is testimony, it is equal to the testimony of any other witness; and, as the plaintiff cannot prevail, unless the balance of proof is in his favor, he must either have two witnesses, or some circumstances in addition to a single witness, in order to turn the balance. We say a second witness, or circumstances; for, certainly, there may be circumstances entirely equivalent to the testimony of any single witness.²

§ 1529. We are, however, carefully to distinguish between cases of this sort, where the answer contains positive allegations, as to facts, responsive to the bill, and cases where the answer, admitting or denying the facts in the bill, sets up other facts in defence, or avoidance. In the latter cases, the defendant's answer is no proof whatsoever, of the facts so stated; but they must be proved by independent testimony.³

§ 1530. In the civil law, (as we have seen,) the parties to a suit might be interrogated upon articles propounded to them under the direction of the judge, as to the facts in controversy. *Ubicunque judicem æquitas moverit, æque oportere fieri interrogationem, dubium non est.*⁴ And, by the rules of law, two witnesses were generally required for the establishment of all the material facts, not made out in writing, or by the solemn admission of the parties in court. *Ubi numerus testium non adjicitur, etiam duo sufficient.* *Pluralis enim elocutio duorum numero contenta est.*⁵ *Sanximus, ut unius testimonium nemo judicum in quacunque causâ facile patiatur admitti. Et nunc manifeste sancimus, ut unius omnino testis responsio non audiat, etiamsi præclaræ Curiae honore præfulgeat.*⁶ These coincidences, between the civil

¹ 2 Fonbl. Eq. B. 6, ch. 2, § 3, note (g); *Pember v. Mathers*, 1 Bro. Ch. R. 52; *Mortimer v. Orchard*, 2 Ves. Jr. R. 243; *Miles v. Miles*, 32 N. Hamp. 166.

² *Clark's Executors v. Van Reimsdyk*, 9 Cranch, 160; *Gresley on Evidence*, 4.

³ *Gilbert's For. Roman.* 51, 52; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 88 to 90.

⁴ *Ante*, § 1486, 1487; *Dig. Lib.* 11, tit. 1, l. 21; 1 *Domat*, B. 3, tit. 6, § 5, art. 4; *Id.* § 6, art. 3, 4, 6, 9.

⁵ *Dig. Lib.* 22, tit. 5, l. 12; 1 *Domat*, B. 3, tit. 6, § 3, art. 13.

⁶ *Cod. Lib.* 4, tit. 20, l. 9, § 1; *Pothier, Pand. Lib.* 22, tit. 5, n. 19. Mr. Justice Blackstone, in his *Commentaries* (3d vol. 370), comments somewhat severely, and,

law and equity jurisprudence, if they do not demonstrate a common origin of the doctrines on this subject, serve, at least, to show that they have a firm foundation in natural justice. The canon law has followed the rule of the civil law.¹

§ 1531. In the next place, the same general rule prevails in equity, as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments; and that the interpretation of them must depend upon their own terms. But, in cases of accident, mistake, or fraud, courts of equity are constantly in the habit of admitting parol evidence, to qualify and correct, and even to defeat the terms of written instruments.² So they will allow parol evidence to rebut a presumption or an equity arising out of written instruments. But in these latter cases, they do not interfere with, or repel the proper construction of the instrument itself, but only the artificial rules of presumption or of equity, which they themselves have created, or applied to cases perfectly indeterminate in their nature, and admitting of either construction, according to the real intent of the party.³

perhaps, not very justly, on this rule of the civil law. "One witness," says he, "(if credible) is sufficient evidence to a jury, of any single fact; although, undoubtedly, the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions, to which only one person is privy; and, therefore, does not always demand the testimony of two, as the civil law universally requires. '*Unius responsio testis omnino non audiat*.' To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, although never so clear and positive, *semi plena probatio* only, on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant), to be examined in his own behalf; and administer to him what is called the *suppletory* oath; and, if his evidence happens to be in his own favor, this immediately converts the half-proof into a whole one. By this ingenious device, satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient, where no more are to be had, and, to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa*."

¹ Evans v. Evans, The Jurist, 1844, vol. 8, p. 1055.

² 2 Starkie, Evid. title *Parol Evidence*, p. 544 to 577 (2d Lond. edit.); 1 Phillips on Evid. ch. 10, § 1 to 3; Id. Pt. 2, ch. 5, § 1, 2 (8th edit. 1838); 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (o); 2 Fonbl. Eq. B. 2, ch. 2, § 6, and note (e); Id. B. 2, ch. 5, § 3, and note (l); *Ante*, § 152 to 168, 179, 767 to 770; Croome v. Lediard, 2 Mylne & Keen, R. 260, 261.

³ Ibid. Mr. Phillips, in his Treatise on Evid. Pt. 2, ch. 10, § 3; Id. Pt. 2, ch. 5,

§ 1532. With these few remarks, we may dismiss these supplementary topics, as to peculiarities of defence and of evidence in courts of equity. And, here, these Commentaries are regularly brought to their close according to their original design. Let not, however, the ingenuous youth imagine, that he, also, may here close his own preparatory studies of equity jurisprudence, or content himself, for the ordinary purposes of practice, with the general survey, which has thus been presented to his view. What has been here offered to his attention is designed only to open the paths for his future inquiries; to stimulate his diligence to wider, and deeper, and more comprehensive examinations; to awaken his ambition to the pursuit of the loftiest objects of his profession; and to impress him with a profound sense of the ample instruction, and glorious rewards which await his future enterprise and patient devotion in the study of the first of human sciences, the law. He has, as yet, been conducted only to the vestibule of the magnificent temple, reared, by the genius and labors of many successive ages, to equity jurisprudence. He has seen the outlines and the proportions, the substructions and the elevations, of this wonderful edifice. He has glanced at some of its more prominent parts, and observed the solid materials of which it is composed, as well as the exquisite skill with which it is fashioned and finished. He has been admitted to a hasty examination of its interior compartments and secret recesses. But the minute details, the subtle contrivances, and the various arrangements, which are adapted to the general exigencies and conveniences of a polished society, remain to invite his curiosity, and gratify his love of refined justice. The grandeur of the entire plan cannot be fully comprehended, but by the persevering researches of many years. The masterpieces of ancient and modern art still continue to be the study and admiration of all those who aspire to a kindred excellence; and new and beautiful lights are perpetually reflected from them, which have been unseen or unfelt before. Let the youthful jurist, who seeks to enlighten his own age, or to instruct posterity, be admonished, that it is by the same means, alone, that he can hope to reach the same end. Let it be his encouragement and consolation, that, by the same means, the same end can be reached. It

§ 1, 2 (8th edit. 1838), has fully collected the cases on this subject. See, also, on the same subject, 2 Starkie on Evid. p. 568 to 570 (2d London edit. 1833); 2 Fonbl. Eq. B. 2, ch. 5, § 3, note (l); *Ante*, 1201, 1202, 1203.

is but for him to give his days and nights with a sincere and constant vigor, to the labors of the great masters of his own profession; and, although he may now be but a humble worshipper at the entrance of the porch, he may hereafter entitle himself to a high place in the ministrations at the altars of the sanctuary of justice.

CHAPTER XLIV.

ESTOPPELS IN EQUITY.

[* § 1533. Equitable estoppels one of the means of promoting fair dealing and preventing fraud.

§ 1534. Acquiescence, which is explained by circumstances, creates no estoppel.

§ 1535. Acquiescence to any extent precludes the party from injunction.

§ 1536. Married woman estopped by acquiescence.

§ 1537. Acquiescence creates no estoppel where no one is misled.

§ 1538. Where the opposite party is misled, no excuse that it was done in good faith.

§ 1539. Joint-stock company bound by acquiescence.

§ 1540. Settlements of account long acquiesced in, conclusive.

§ 1541. Difference between executory and executed interests, as to acquiescence.

§ 1542. Where one sees money paid, for his benefit, and does not object, he is concluded by the contract.

§ 1543. Fraudulent purpose and fraudulent result creates estoppel.

§ 1544. Estoppels in regard to dedication of land to public use.

§ 1545. Married woman estopped by deed, not dissented from.

§ 1546. Estoppel created by acts as well as by words.

§ 1547. Joint-stock company bound by prospectus.

§ 1548. Courts of equity adopt the same construction as courts of law.

§ 1549. Further illustrations of the subject.

§ 1550. The subject applied to tenure of land.

§ 1551. Party objecting to securities, as fraudulent, must object at the earliest moment.

§ 1552. Remarkable case of delay in enforcing claim.

§ 1553. In case of extensive works, party must object at once.]

[* § 1533. THE subject of equitable estoppels, or estoppels in fact, although not formally discussed in any of the preceding chapters, and not named in terms, is nevertheless incidentally alluded to, in connection with the statute of limitations, and laches,¹ and has become one of great practical importance; and it seems necessary, to a full understanding of the present state of equity law, in regard to it, that we should give it more than

¹ *Ante*, § 64 a, § 1520 to 1522.

a passing notice. It forms a very essential element in that fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote.

§ 1534. It applies to all cases where rights, once valid, are lost by delay, and the implied acquiescence, resulting from such delay. In a late case,¹ in the Court of Appeal in Chancery, before the Lords Justices, it was held, that, where the plaintiff had the right to prevent a party from erecting buildings upon his own land, in consequence of the covenants of his grantor with the grantor of the plaintiff, and he gave notice of such right, and of an intention to enforce it, before any expense was incurred, and followed such notice by a bill for an injunction, although not filed till four months afterwards, he was not estopped by his delay, it appearing that the plaintiff could not sooner establish his right to enforce the prohibition.

§ 1535. So, too, in another case before the same court, it was held that where the party had acquiesced in the violation of a covenant to a certain extent, this afforded sufficient objection to the granting of an interlocutory injunction against a greater violation of it.²

§ 1536. So, also, where a married woman, entitled to the income of a legacy, for her separate use, continued for fifteen years, with full notice of the circumstances affecting her rights, to receive the income, on the footing that the legacy was liable to contribute in favor of the residuary legatees, to a loss occurring on the reinvestment of part of the estate, and it was afterwards decided that the legacy was not liable so to contribute, but must be paid in full; it was held that she could not recover from the residuary legatees the sums which she had before acquiesced in allowing to be paid to them,³ and which they had expended as their own, in faith of such acquiescence. Such acquiescence constituted an equitable estoppel upon any such claim since it had been acted upon in good faith by the other party.

§ 1537. But the equitable rule as to the effect of a person's lying by, and allowing another to expend money on his property, does not apply where the money is expended with knowledge of

¹ *Coles v. Sims*, 5 De G. M. & G. 1.

² *Child v. Douglas*, 5 De G. M. & G. 739.

³ *Stafford v. Stafford*, 1 De G. & J. 193. See *Bate v. Hooper*, 5 De G. M. & G. 338.

the real state of the title.¹ [* But in a late case² it was decided, that where a landlord stands by and sees a tenant lay out money on the faith of a promised lease, this, though not strictly part-performance, may raise an equity analogous to that which is raised when one stands by and sees another expend money on his land, believing he has good title. And this principle affects corporations and other joint-stock companies the same as it does individuals.³] But where a partner in a joint-stock company, after his shares were declared forfeit, lay by for seven years, while the affairs of the concern were greatly depressed, until they began to be more prosperous, and then filed his bill to be let in to a share of the profits, it was held that he must be considered as having acquiesced in the action of the directors, in declaring his shares forfeited, and that he was not entitled to the relief sought.⁴ But the principle of this case was held not to apply, where the surviving partner had refused to give the representatives of a deceased partner all the information as to the state of the concern, which was necessary to enable them to exercise a sound discretion, as to whether they should claim an interest, and take a share in the risks of the concern.⁵

§ 1538. Where a party, by misrepresentation, draws another into a contract, he may be compelled to make good the representation, if that be possible; but, if not, the other party may avoid the contract. And the same principle applies, although the party making the representation believed it to be true, if, in the due discharge of his duty, he ought to have known the fact.⁶ Third parties who, by false representations, induce others to enter into contracts, are estopped from afterwards falsifying their statements, and if necessary may be compelled to make them good. But where a contract is entered into, upon the false statement of one

¹ *Rennie v. Young*, 2 De G. & J. 136.

² [* *Nunn v. Fabian*, 11 Jur. N. S. 868; *Thornton v. Ramden*, 4 Giff. 519.

³ *Strand v. Music Hall Co. in re*, 14 W. R. 6; *Hill v. So. Staffordshire Railw.* 11 Jur. N. S. 192; *Wilson v. West Hartlepool Rail. & Harb. Co.* 11 Jur. N. S. 124; *Steevens Hospital v. Dyas*, 15 Ir. Ch. 405.]

⁴ *Pendergast v. Turton*, 1 Younge & C. 98; *Ante*, § 1325.

⁵ *Lord Cranworth in Clements v. Hall*, 2 De G. & J. 173.

⁶ *Pulsford v. Richards*, 17 Beavan, 87. It is here held that persons who take shares in the formation of a railway company, and the directors who form it, are mutually contracting parties, and the prospectus is a representation forming the basis of the contract for the sale of such shares.

not a party, it is no ground of avoiding the contract. Misrepresentation may be either by the suppression of truth or the suggestion of falsehood; but to be the ground for avoiding the contract, it must be such that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract.¹

§ 1539. This principle has often been applied to the proceedings of joint-stock companies not strictly in accordance with the requirements of their charter. As where power was given, by the deed of settlement, at a meeting of two thirds in number and value, of the shareholders, to borrow money on debentures; and the directors borrowed money on debentures, upon the resolution of a meeting, at which the requisite number did not attend, and the debentures were issued to persons present at the meeting, and the money applied in payment of the debts of the company, and interest paid on the loans, for two years; it was held that the original issue of debentures was invalid, but that it was cured by the subsequent acquiescence of the company.²

§ 1540. And upon similar grounds, courts refuse to disturb settlements long acquiesced in, although between parties holding confidential relations to each other, and of such a nature as to give one great advantage over the other, in making such settlements;³ as, for instance, between trustee and *cestui que trust*.⁴ And the acknowledgments of money received, in the account of the trustee, on behalf of the *cestui que trust*, are evidence against the latter.

§ 1541. This subject is extensively discussed, and the cases reviewed, in an important case before the House of Lords, in the early part of 1859.⁵ The Lord Chancellor Chelmsford maintained an essential difference between executory and executed interests, in regard to the effect of laches in asserting the claim. In regard to the former, and where it is requisite to resort to a court of equity to be put in possession of them, "It is," says the learned judge, "an invariable principle of the court, that the party must come promptly, — that there must be no unreasonable delay; and

¹ Ibid.

² The *Magdalena Steam Nav. Co. in re*, 6 Jur. N. S. 975. See the cases reviewed in regard to acquiescence in equity in *Redfield on Railways*, 510, 511, § 220; *Ante*, § 345 *a*, 518 *a*. See also *Laird v. Birkenhead Railw. Co.* 6 Jur. N. S. 140; *Bankart v. Houghton*, 5 Jur. N. S. 282.

³ *Bright v. Legerton*, 6 Jur. N. S. 1179.

⁴ Ibid.

⁵ *Clarke v. Hart*, 5 Jur. N. S. 447.

if there is anything on his part which amounts to laches, courts of equity have always said, 'We will refuse you relief.' With regard to interests which are executed, the consideration is entirely different. There, mere laches will not disentitle the party to relief by a court of equity, but a party may, by standing by, as it has been metaphorically called, waive or abandon any right which he may possess. . . . I apprehend, where there is a vested right or interest in any party, the principle of law, as now firmly established, is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement, or to a license."¹

§ 1542. But where, upon the occasion of a transaction, money is, with the privity and in the presence of any person, paid upon the faith of a representation which that person understands, (and knows is about to be thus acted upon, and that his not disputing will be regarded as confirmation of it, and he remains silent,) he is bound to fulfil the purpose for which it was made.² This was the case of one tenant in common contracting for the sale of the entire estate, other tenants being present, when a portion of the purchase-money was paid to the mortgagee, and making no objection, were held bound by the agreement.

§ 1543. This doctrine of estoppels *in pais*, or equitable estoppels, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. As if both parties were equally conscious of the facts, and the declaration, or silence, of one party, produced no change in the conduct of the other, he acting solely upon his own judgment.³ There must be deception, and change of conduct in consequence, in order to estop the party from showing the truth.⁴

§ 1544. An estoppel may occur in regard to the dedication of land to public use, from the circumstances under which it is done, and the acts which it induces in others. As where one sells house-lots adjoining a space held out as an open street, or public square, and valuable erections and improvements are made in

¹ The learned judge here quotes the language of Lord Denman, in *Pickard v. Sears*, 6 Ad. & Ellis, 469; and that of Parke, B., in *Freeman v. Cooke*, 2 Exch. 654.

² *Davies v. Davies*, 6 Jur. N. S. 1320. See also *Martin v. Righter*, 2 Stockton, Ch. 510. The rule is defined in *Eldred v. Hazlett's Adm'r*, 33 Penn. State R. 307; *Blackwood v. Jones*, 4 Jones, Eq. R. 54.

³ *Eldred v. Hazlett's Adm'r*, 33 Penn. St. R. 307.

⁴ *White v. Langdon*, 30 Vt. R. 599.

faith of such professions, there arises, forthwith, an irrevocable dedication of such property to public use, in the form indicated.¹

§ 1545. In a late case, where a married woman executed a deed, *inter partes*, whereby she attempted to make her husband's debt a charge upon her separate estate, the court held the deed itself inoperative; but inasmuch as the woman, after she became discovert, did not repudiate the deed, but for some years continued to recognize it, as a valid security, it was considered that she thereby confirmed it. So that her adoption and confirmation should have the same effect as if the deed had been executed by her *de novo*.²

§ 1546. In a late case³ before the House of Lords, on appeal from the Court of Session in Scotland, the Lord Chancellor discusses this question of estoppel in fact, or acquiescence in adversary claim of right, somewhat in detail. He is reported thus: ⁴ "It is a universal law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." And again: "If a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license."

§ 1547. So, also, in a very late case,⁵ where the subject of the sale of shares in a joint-stock company, through the instrumentality of a prospectus issued by the directors of the company, came in question; it was held that where the representations contained in the prospectus were believed by the company to be correct, at

¹ *Rives v. Dudley*, 3 Jones, Eq. R. 126. But a mere permission to build on one's land a toll-bridge does not amount to a dedication of the land to public use. *Ibid*.

² *Skottowe v. Williams*, 7 Jur. N. S. 118.

³ *Cairncross v. Lorimer*, 7 Jur. N. S. 149.

⁴ *Ibid*.

⁵ *New Br. and Canada Railw. and Land Co. v. Muggeridge*, 7 Jur. N. S. 132 (Dec. 1860).

the time the prospectus issued, and a person agrees to accept shares upon the faith of them, and without making inquiries, the company cannot enforce the agreement, after the representations have been discovered to be false. The company were bound to know they were true before making them; and, having made them, are now bound to make them good to those who have acted upon the faith of them, or else relinquish all advantage gained by them.

• § 1548. It is sometimes attempted to be maintained that courts of equity require a more perfect good faith, and visit a severer condemnation upon parties, for any departure from its strict observance, than courts of law. It may be true that they are sometimes enabled, by means of their different modes of procedure, to effect more perfect justice between parties, and thus seemingly to redress some departures from honesty and fair dealing, in a more exemplary manner, than can be done in courts of law. But it is well settled, that there is no equitable construction of a contract, or a duty, different from its legal one. The same is true in the construction of statutes.¹

§ 1549. There are many other cases of equitable estoppel which we can only present as illustrations of the principle. Courts of equity will interfere, by injunction, to restrain land-owners from maintaining ejectment against a canal company who have been permitted by such owner to occupy the land sued for, during forty years, by paying an agreed rent; and also from erecting a bridge upon the land, on the ground of acquiescence in the company's use of the land, they undertaking to put in force their statutory powers to acquire the land.²

§ 1550. So, also, where the successive owners of freehold lands, with which the parish lands were mixed, being also tenants from year to year of the parish lands, and having for a long time paid a certain rent to the parish, and taken receipts from the collectors expressed "for rent of parish lands"; it was held, that the present owners could not be allowed to prove that the very land belonging to the parish was not in their possession, and that the rent had been paid by them and their immediate predecessors, by virtue of a contract of indemnity between them and the occupiers

¹ *Scott v. Corporation of Liverpool*, 5 Jur. N. S. 105.

² *Somersetshire Coal Canal Co. v. Harcourt*, 2 De G. & J. 596. See also *Duke of Beaufort v. Patrick*, 17 Beavan, 60; *Mold v. Wheatcroft*, 6 Jur. N. S. 2.

of the parish land, their conduct being equivalent to a representation that they had parish land in their possession, in which the parish had been induced to trust and to act accordingly. And it was also held that a purchaser of land, from an owner who had thus been paying rent to the parish, must be regarded as having notice that part of the land purchased belonged to the parish.¹

§ 1551. And in cases of alleged fraud in the sale of real estate (and the rule is the same in other cases of sales), where the vendee seeks to defend against the securities, at law, or to have them set aside by a court of equity, on the ground of fraud, it is incumbent upon him to interpose the objection, at the earliest possible moment; and if, after he discovers the existence of the facts, which are claimed to constitute fraud, he continues to act under the contract, except for the mere purpose of preserving the property for the party ultimately entitled, he will be held to have affirmed the contract, with full knowledge of all the facts.² [*And where the defendant in a bill to redeem expressly waives all objection to such redemption upon the payment of the sum due in equity, and so states in his answer, he cannot afterwards be allowed to insist that the mortgage was foreclosed before the commencement of the suit.³ So, also, where the mortgagor executes a bond and mortgage to secure the debt of a third party to the mortgagee, he will not be at liberty to defend against it upon the ground of any equities between himself and the original debtor. As a general rule, the assignee of a mortgage takes the mortgage subject to all the equities subsisting against it in the hands of the mortgagee. But if the mortgagor, when applied to for information, misleads the assignee as to the amount due, or conceals his equitable defence, or stands silently by and permits the assignee in good faith to pay his money and take an assignment for its full nominal value, he cannot afterwards set up his equitable defence against the claim of the assignee for full payment.⁴

§ 1552. In a somewhat remarkable case,⁵ which came before

¹ Attorney-General v. Stevens, 1 Kay & J. 724.

² Jennings v. Broughton, 5 De G. M. & G. 126; Downer v. Smith, 32 Vt. R. 22 Law Rep. 28; Farebrother v. Gibson, 3 De Gex & J. 602; Gatling v. Newell, 9 Ind. R. 572.

³ [*Strong v. Blanchard, 4 Allen, 538.

⁴ Lee v. Kirkpatrick, 1 McCarter, 264.]

⁵ Reimers v. Druce, 23 Beavan, 145. See also Ware v. Regent's Canal Co. 3 De G. & J. 212.

the Master of the Rolls in 1856, the decision is placed upon the ground of delay in instituting proceedings. The facts upon which the claim rested were briefly these: In 1818, the plaintiffs, who carried on business at Emden, in Hanover, consigned a cargo of wheat to defendant's testator, doing business in London. The wheat was kept in warehouse unsold until 1825, and then sold for less than the expense already incurred in storage. In 1832, proceedings were instituted in the Hanoverian courts to recover the balance of the expense above the price; and after going, by appeal, throughout all the tribunals of the kingdom, resulted in a judgment for the defendant for a balance of £ 1350, being the value of his wheat, probably. This judgment was accompanied with reasons, stating that the contract was to be governed by the law of Hanover, and was rendered in 1842. The debtor died in England four years after, and his executors were appointed in due course, and the bill was brought in 1855, to compel payment out of his assets. As no excuse for the delay was given, the learned judge said: "I have thought that a due regard to justice and the necessity of compelling parties to enforce their demands with diligence, requires me to dismiss this bill."

§ 1553. The case was discussed at very great length upon the question of the validity of the foreign judgment.¹ The late English cases seem to assume the ground, that in the case of extensive public works, or even those of a more private character, which are liable to cause serious damage to the adjoining land-owners, by obstructing the flow of water, or otherwise, it is the duty of the party complaining to take proceedings while the works are in progress, or at the earliest convenient period after the full extent of the damage is fairly ascertainable; and if this be not done, a court of equity will not interfere, but leave the parties to their legal remedies.²]

¹ [* *Post*, § 1576.

² *Hinks v. Hunt*, Johnson, 372. So also in *Chapman v. Railway Co.* 6 Ohio, N. S. R. 119.]

CHAPTER XLV.

EQUITY JURISDICTION AFFECTING RAILWAYS.

[* § 1554. Equity jurisdiction as to railways and joint-stock companies.

§ 1555. Courts of equity will not assume control of railway construction.

§ 1556. Cannot apply funds to purposes foreign to charter.

§ 1557. Difficulty in applying this principle.

§ 1558. Illustrations of its application.

§ 1559. Further illustrations of the same principle.

§ 1560. One company cannot absorb the business of another.

§ 1561. Courts of equity will control petition to legislature.

§ 1562. Will not control internal management of corporations.

§ 1563. Will control construction of works.

§ 1564. Will require officers to perform duties as trustees.

§ 1565. The acts of such officers favorably construed.

§ 1566. Will decree specific performance of contracts by such companies.

§ 1567, 1568. Mode of constructing works.

§ 1569. Will restrain one company from interfering with exclusive franchises of another.]

§ 1554. WE can give here little more than the outline of equity jurisdiction connected with railways, and other joint-stock companies. The subject is discussed in detail, in a work devoted exclusively to the subject of railways,¹ where the cases will be found carefully digested and analyzed, and we have ventured to refer to this work as containing our own views; since it would be little less than an affectation to appear here to have drawn our present suggestions from any other source.

§ 1555. In regard to injunctions affecting railway companies, courts of equity have declined to assume the control of railway construction.² But such companies may be restrained from taking land after their statutory powers have ceased, and from doing other acts exceeding their powers.³

§ 1556. It has also been held, that a joint-stock company cannot use the joint property except within the legitimate scope of their charter; that the shareholders are bound by such modifications of their charter as are not fundamental, but merely auxiliary to the main design; and that if a majority of the company

¹ Redfield on Railways, § 205 to 224.

² Webb v. Manchester & Leeds Railway Co. 4 My. & Cr. 116.

³ Redfield on Railways, § 205, pl. 2, 6.

obtain an alteration of their charter, which is fundamental, as to enable them to build an extension of their road, any shareholder who has not assented to the act may restrain the company, by injunction, from applying the funds of the original organization to the extension.¹ So, too, a company will be restrained, by injunction, from surrendering their charter, with a view to obtain another for a different purpose.²

§ 1557. Upon the question how far the directors of a railway, or other similar company, can apply the funds of the company to objects fundamentally different from those specified in their charter, there is no difference of opinion, in regard to the principle, but infinite diversity in the application of the rule. The subject is carefully digested, in another place,³ and the result of the cases stated.

§ 1558. It seems to be settled, that a fundamental alteration of the objects of the charter, as by allowing a railway to purchase steamboats, will release subscribers who had taken stock.⁴ And the fact that the project will tend to improve the value of the original stock will not excuse the departure from the fundamental purpose of the original charter.⁵ But such acts of the directors as come within the general powers conferred by the charter will not exonerate subscribers.⁶ And it has sometimes been held, that an act of the directors which violated the terms of a subscription, but which did not affect the interest of the subscriber, will not release the contract.⁷ Courts of equity often compel corporations to act within the requirements of their charter where they attempt a departure which would be likely to cause irreparable mischief to any one.⁸

§ 1559. Injunctions are issued, with great caution, by the Eng-

¹ *Stevens v. Rut. & Bur. Railway Co.* 1 Law Register, 154; *Redfield on Railways*, 92, where the substance of this very elaborate and satisfactory opinion of Chancellor Bennett will be found. See also *Nataseh v. Irving*, 2 Cooper, Ch. Cas. 358.

² *Ward v. Society of Attorneys*, 1 Colby, 370.

³ *Redfield on Railways*, chap. ix. sec. x.; § 56, p. 91 to 96.

⁴ *Hartford & N. H. Railway v. Croswell*, 5 Hill, 383.

⁵ *Macedon Pl. Road Co. v. Lapham*, 18 Barb. 312. But see *Granville Railway v. Coleman*, 5 Rich. 118.

⁶ *Faulkner v. Hebard*, 26 Vt. R. 452; *Redfield on Railways*, 95 and notes.

⁷ *Banet v. Alton & Sangamon Railway*, 13 Illinois, 504; *Danbury & Norwalk Railway v. Wilson*, 22 Conn. R. 435.

⁸ *Redfield on Railways*, chap. ix. sec. x.; § 214, p. 500 to 503.

lish courts of equity, where their effect would be to cause serious loss to these extensive companies, and whose business materially interests the public.¹ An injunction will not be granted for the purpose of trying the constitutionality of the company's act. For all preliminary purposes, and until the hearing upon the merits, that will be assumed to be constitutional.² Injunctions will be granted to restrain railway companies from a certain rate of profit, and securing the capital of a steam-packet company, which was to act in connection with the railway, with a view thereby to enhance its profits.³ So, too, a railway company will be restrained from purchasing shares in another railway company, or applying their funds in its support;⁴ or from giving up the management of its line to another company;⁵ or from building part of their line and abandoning the remainder;⁶ or from procuring an illegal amalgamation.⁷

§ 1560. The directors of a life insurance company, not being authorized thereto by their deed of settlement, cannot, by a transfer of the business and the liabilities of another life insurance company to their own company, fetter their shareholders with such liabilities.⁸ It is proper to enjoin a corporation, at the suit of one stockholder, from employing their powers, or funds, for the accomplishment of purposes not within their charter.⁹

§ 1561. Courts of equity have assumed to exercise control, in some cases, and within certain limits, in regard to railway and other joint-stock companies, petitioning the legislature for a change of their corporate powers. But the exercise of such control is now

¹ Redfield on Railways, § 206 *b*, and cases cited in notes.

² *Deering v. The York & Cumberland Railway Co.* 31 Me. R. 172.

³ *Codman v. Eastern Counties Railway Company*, 1 Beavan, 1; *Bagshaw v. Same*, 7 Hare, 114; S. C. affirmed, 2 M. & G. 389.

⁴ *Solomon v. Laing*, 12 Beavan, 339; *Great W. R. Co. v. Rushout*, 5 De G. & Sm. 290; *Balt. & O. Railway Co. v. Wheeling*, 13 Gratt. 40.

⁵ *Beman v. Rufford*, 6 Eng. L. & Eq. R. 106; *Winch v. Rich. & Lan. Railway Co.* 13 Eng. L. & Eq. R. 506; *Great Northern Railway Co. v. Eastern Counties Railway Co.* 12 Eng. L. & Eq. R. 224.

⁶ *Cohen v. Wilkinson*, 12 Beavan, 125, 138; S. C. affirmed, 1 M. & G. 481. But see this question more fully discussed, and the cases cited, in Redfield on Railways, 488, 489, § 210.

⁷ *Parker v. Dun. Nav. Co.* 1 De G. & Sm. 192. See the cases also upon this point, in Redfield on Railways, 623, § 254.

⁸ *In re The Era Insurance Co. (Williams's case)*, 6 Jur. N. S. 1334.

⁹ *Gifford v. New Jersey Railway Co.* 2 Stockton, Ch. R. 171.

reduced within narrow limits and scarcely extends beyond the application of their existing funds to enterprises fundamentally different from those for which they were pledged to support and carry forward.¹ In a late case, it is held that applications to the legislature on public grounds cannot be restrained by courts of equity; but that those of a private nature may be, in the discretion of the courts.²

§ 1562. The subject of the interference of courts of equity in regard to the conduct and management of railway and other similar corporations, is thus discussed by an eminent equity judge, Lord Langdale, M. R.³ "The class of cases in which this court has often been called upon to interfere are those which arise out of a combination of acts which are in themselves illegal, and, considered as breaches of contract, with the public acts which are breaches of contract, express or implied, with the subscribers to the undertaking, and acts erroneous, or breaches of contract, incapable of being rectified by the shareholders themselves, in the exercise of their own powers." The conclusion to which the English courts have come in regard to this question is, that whenever the acts complained of are capable of being rectified by the shareholders themselves, in the exercise of their corporate powers, equity will not interfere, but leave questions of internal management and regulation to be settled by the shareholders in corporate meeting.⁴ But where the charter of the company prescribes a particular course to be pursued by the directors and agents of the company, and they are acting in violation of the requirement, and to the injury, of shareholders, a court of equity will interfere by way of injunction.⁵ Equity will also interfere by injunction in many other cases, where the officers of corporations are acting in violation of duty, either general or specific.⁶

¹ Redfield on Railways, § 212.

² *Lancaster and Carlisle Railway Co. v. N. W. Railw. Co.* 2 K. & J. 293. See also *Merritt v. Shrewsbury and Chester Railw. Co.* 3 Eng. L. & Eq. R. 144.

³ *Brown v. The Monmouthshire Railw. & Canal Co.* 4 Eng. L. & Eq. R. 113; S. C. 13 Beavan, 32.

⁴ Redfield on Railw. 490, § 211.

⁵ *Allen v. Talbot*, 30 Law Times, 316.

⁶ Redfield on Railw. chap. xxviii. sec. vii. § 211, pp. 489, 496, where the cases are fully discussed. [* See *Hilles v. Parrish*, 1 McCarter, 380, where the learned chancellor adopts the rule laid down by Chief Justice Taney, in *Bank of Augusta v. Earle*, 13 Pet. U. S. 519, 588, viz: "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . It must dwell

§ 1563. Equity, in obvious cases, will interfere and control the action of railway companies in regard to the construction of their works, directing the mode of crossing highways, at the instance of the trustees having the charge of the maintenance of such highways.¹ It is considered that railway companies perform important public functions, in regard to many of which they are under the control of a board of supervision created by the supreme legislative authority, denominated railway commissioners; and courts of equity regard the decisions and orders of this board, within the sphere of their proper jurisdiction, as conclusive, unless reversed in some mode prescribed by law. They will therefore carry such orders into effect, without inquiring into the reasons which induced the commissioners to make the order.²

§ 1564. So, too, courts of equity will require the officers of joint-stock companies to account for moneys received in trust for the company. The directors of a company, on the transfer of its business to another company, received from the latter a large sum for compensation, the particulars of which they withheld from the members; and it was held that they were trustees of the money for the members, and they were ordered, on application for an interlocutory injunction, to pay it into court.³

§ 1565. But the acts of corporate officers will receive a favorable construction, and will be upheld when not in violation of the spirit of their charter. The directors of a company were prohibited, by their charter, from giving bills of exchange, but they had power to borrow on mortgage. They however gave bills to secure an existing debt, and a mortgage was at the same time executed, under the seal of the company, which was made subject to redemption, on payment of the bills. It was held that the mortgage was given to secure the debt, and not the payment of the bills, and therefore was not invalid on that account; and that, upon a bill of foreclosure, the deed of the company must be treated as valid, until set aside by an independent proceeding.⁴

in the place of its creation, and cannot migrate to another sovereignty." The same rule is reaffirmed by Mr. Justice Thompson, in *Runyan v. Coster*, 14 Pet. U. S. 122, 129. See also *Miller v. Ewer*, 27 Me. 509.

¹ *Redfield on Railw.* § 207, 208, pp. 282–286, and cases cited; *Springfield v. Conn. River Railw.* 4 Cush. R. 63.

² *Hodges on Railways*, 671; *Newry and Enniskillen Railway v. Ulster Railway*, 39 Eng. L. & Eq. R. 553; *Redfield on Railways*, 488.

³ *Gaskell v. Chambers*, 26 Beavan, 360.

⁴ *Scott v. Colburn*, 26 Beavan, 276.

§ 1566. Courts of equity often interfere by way of decreeing specific performance of contracts of railways, with each other, and with natural persons; such as contracts by one company to permit another to run upon its track; contracts in regard to farm accommodations; and contracts with land-owners and many others.¹ The discussion of this subject, in its full extension, would occupy more space than could be reasonably devoted to it in a treatise of this general character.

§ 1567. Where a railway company agreed with a land-owner, through whose estate the railway would pass, to construct and maintain a "siding" connected with their railway, at a particular point, together with all necessary approaches thereto for public use, for the reception and delivery of goods, it was held that specific performance of the agreement to construct might be decreed, without making any decree in regard to maintaining them when constructed.² Upon this point the learned Vice-Chancellor said: "I think that it is no objection to specific performance," "that there is a clause in the agreement, that the party making it shall keep it in repair when made." "I may order that the work shall be done; and the question of repairs will be a matter of inquiry, when a breach of that part of the agreement occurs."

§ 1568. In this case an inquiry arose in regard to the extent of the term "siding," and there occurred the usual contradiction in the testimony of the experts. On the part of the plaintiff, it was deposed by numerous witnesses, that it imported nothing less than all the appliances of a furnished station for the receipt and discharge of freight, with a servant of the company in constant attendance to accommodate the public; and, on the part of the defendant, that nothing more was intended by the term, than a side-track where cars could be set aside, for the discharge and receipt of freight, the responsibility of lading and unlading resting with the owners chiefly. The learned judge said: "I cannot give much credit to the witnesses who say that a siding, according to their interpretation of the word, means numerous other things, which may no doubt be very convenient, but which are not cov-

¹ *Great Northern Railway v. Manchester, Sh. & L. Railway*, 10 Eng. L. & Eq. R. 11; *Redfield on Railways*, § 213, pp. 498-500; *Id.* 54, 55, 56; *Id.* 107-110; *Id.* 445; *Id.* 647-662.

² *Sir Edward Bulwer Lytton v. Great Northern Railw. Co.* 2 Kay & J. 394. See also *Sanderson v. C. & W. Railw. Co.* 11 Beavan, 497.

ered by the true signification of the word. According to that construction the words should be equivalent to a siding with all proper conveniences connected therewith; but nothing of that kind is specified in the agreement." And again, "If he" (the plaintiff) "had wished to have a station made, it would have been easy to have said so; the meaning of that word is familiar to every one."

§ 1569. Equity interferes also to restrain one railway company from interfering with the exclusive franchises of another, which have been secured to them by legislative grant. But this question involves such an extensive inquiry into important and difficult constitutional questions, that we can do little more than refer to some of the leading cases upon the subject.¹

CHAPTER XLVI.

THE EFFECT OF JUDGMENTS AT LAW.—FOREIGN JUDGMENTS.

[* § 1570. How far courts of equity control judgments at law.

§ 1571. Can only enjoin the collection of such judgment.

§ 1572. Grounds upon which such injunctions granted.

§ 1573. In what cases judgment at law conclusive.

§ 1574. When courts of equity rehear cases decided at law.

§ 1575. How far fraud is a defence against a judgment.

§ 1576. Foreign judgments generally held conclusive.

§ 1577. Review of the later cases upon the question.

§ 1578. The difficulty of defining any limitation.

§ 1579. Accounts rendered by executors in a foreign court.

§ 1580. How far decisions of courts of last resort revisable.

§ 1581. How far fraud affects foreign judgments.

§ 1582. It must be fraud in obtaining the judgment.

§ 1582 *a*. Foreign judgment *in rem* conclusive upon the parties.

§ 1583. The disposition to deal summarily with foreign judgments.

§ 1584. The facility thus afforded to evade their effects.]

§ 1570. As courts of law constitute a jurisdiction altogether independent of and foreign to that of courts of equity, the control

¹ Dart. Coll. *v.* Woodward, 4 Wheaton, 518; Providence Bank *v.* Billings, 4 Peters, Sup. Ct. R. 514; Charles River Bridge *v.* Warren Bridge, 11 Peters, Sup. Ct. R. 420; Redfield on Railways, § 214, pp. 500–503; Id. § 231, pp. 537–562, where the cases bearing upon the question are extensively cited.

which courts of equity assume to exercise over the judgments of such courts is very much the same which it exercises over the judgments of courts altogether foreign to the forum where the court of equity exists. It may be important, therefore, to obtain clear views of the grounds and the mode of this interference, that we may be the better able to comprehend the true limits of the jurisdiction; and thus to define, with accuracy and precision, where any excess is liable to occur, and especially where it may be proper to invoke the interference of courts of equity in regard to judgments at law.

§ 1571. Equity never attempts to act upon the court of law itself, and does not claim any supervisory power over such courts, or the proceedings therein.¹ It acts solely upon the party, and will enjoin him, in a proper case, from pursuing any claim in a court of law, over which the courts of equity have a concurrent jurisdiction and a more perfect means of doing complete justice. This it never attempts to accomplish, after judgment, in a matter where the court of law had concurrent jurisdiction, by declaring the judgment void, or setting it aside, but only by enjoining the party from proceeding to enforce it.

§ 1572. And this it will never do upon the ground of mistake or error in the judgment of the court of law; or that the court of equity, in deciding the same questions decided by the court of law, would have come to a different conclusion. But only upon the ground that the party had some defence against the claim, which has occurred, or first come to his knowledge, since the trial in the court of law, whereby it would be a virtual fraud in the party recovering at law now to insist upon enforcing his judgment.² But where the fact existed before the trial at law, upon which the relief in equity is claimed, and was also known to the party suing in equity, or might have been discovered by the exercise of diligence, and was as much a defence at law as in equity, no redress can ordinarily be obtained in equity.³

§ 1573. In matters where the jurisdiction of the courts of law and equity is entirely concurrent, the adjudication of the court of law is conclusive upon courts of equity. And a court of equity will not interfere to relieve a party from such adjudication except

¹ *Ante*, § 875, and cases cited.

² *Paddock v. Palmer*, 19 Vermont R. 581; *Ante*, § 257 *b*.

³ *Ante*, § 894, 895.

upon the ground of newly discovered matter since the trial; of fraud in obtaining the judgment; or of some inevitable accident or mistake. But where the party has equitable rights, not cognizable in a court of law, which would in a court of equity have prevented such an adjudication as was made in the court of law, the judgment will interpose no obstacle to redress in equity, since the court of law had no proper jurisdiction of the subject-matter forming the basis of redress in equity.¹

§ 1574. And although some of the earlier decisions look almost like granting new trials in equity in regard to all matters adjudicated at law, where there has been surprise at the trial, or newly discovered evidence,² since the more recent and better considered cases will justify no such proposition. The new trial is

¹ *Dunham v. Downer*, 31 Vt. R. 249; *Lansing v. Eddy*, 1 Johns. Ch. R. 49; *Simpson v. Hort*, 1 Johns. Ch. R. 98; *S. C. on Appeal*, 14 Johns. R. 63; *Ante*, § 894, 895, 895 a; *Clifton v. Livor*, 24 Ga. R. 91. It is no objection to the conclusiveness of the finding of a court of equity, that the party had in fact full remedy at law, so that in truth the court of equity never had any proper jurisdiction of the case. And it makes no difference, in this respect, whether such want of jurisdiction appear upon the face of the bill, but, not being insisted upon, is disregarded by the Court of Equity, and a decree passes upon the merits; or such defect of jurisdiction is shown by the proofs in support of the answer; and the case is dismissed upon that ground, upon the final hearing. *Munson v. Munson*, 30 Conn. 425. As to the conclusiveness of judgments in ejectment in the American practice, see *Miles v. Caldwell*, 2 Wallace, U. S. 36.

² *Gainsborough v. Gifford*, 2 P. Wms. 424. In a late case, where the question is examined, the law is thus stated: "The early English cases which have been brought to our notice, and which we have before had occasion to examine, and some of the American cases; and especially *Colyer v. Langford*, 1 A. K. Marshall, R. 237, seem to go upon the ground that a bill will be entertained for a new trial, in an action determined at law, upon very much the same grounds that new trials are granted at law, where the courts of law have no means of granting a new trial in the case," [or for any reason decline to interfere.] "But the numerous cases in this State, from *Essex v. Berry*, 2 Vt. R. 161, to *Warner v. Conant*, 24 Vt. 351, have established the rule upon a very much narrower basis. The rule of the best considered and more recent cases upon the subject is, that the party must have failed in obtaining redress in the suit at law, by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel. That is the rule laid down in *Emerson v. Udall*, 13 Vt. R. 477, and *Pettes v. Bank of Whitehall*, 17 Vt. R. 435. The rule in Connecticut, *Carrington v. Hollabaird*, 17 Conn. R. 530, *S. C.* 19 Id. 84, is laid down in almost the same terms,—stress being laid upon the fact that the plaintiff's failure to obtain justice at law has been "without fault on his part." *Burton v. Wiley*, 26 Vt. R. 430, 432.

never granted, in terms. There can be, in no such case, anything like another trial in the court of law. The case is effectually ended there. But where there was a distinct and decided fraud in the proceedings by which the judgment at law was obtained, as by putting in testimony which the party believed to be false; by giving no notice of the suit, or one calculated to mislead the defendant and thus deprive him of an opportunity to be heard in the trial at law; or, in any similar mode, making the trial at law fictitious or fallacious; and also where the defendant at law, through accident or mistake, and without default in the proper degree of watchfulness and care required of careful men in their own concerns of equal importance, fails to present his defence fully; courts of equity will in their discretion grant relief, by re-examining the case upon its merits, and either enjoining the party from pursuing the judgment at law; or, where some portion of the claim is due, granting such an injunction as to a portion of it; or upon condition that the plaintiff shall pay into court whatever sum is due upon the judgment, with reasonable costs.¹

§ 1575. It seems to be conclusively settled that a judgment can only be impeached in a court of equity for fraud in its concoction. It is said, "there is no case in which equity has ever undertaken to question a judgment for irregularity. The power of a court of law is always exercised in such cases in sound discretion, and the relief is frequently granted on terms. This court cannot impose any such terms or take any such cognizance of the case."² If then the judgment of a court of competent jurisdiction can only be enjoined in a court of equity, upon the ground of fraud, (and this fraud must have been practised in the very act of obtaining the judgment, or else it will be concluded by the judgment at law, where fraud is equally a defence as in equity,) it remains to in-

¹ *Emerson v. Udall*, 13 Vt. R. 477; *Cutting v. Carter*, 29 Vt. R. 72; *Stone v. Seaver*, 5 Vt. R. 549.

² Chancellor Kent in *Shottenkirk v. Wheeler*, 3 Johns. Ch. R. 275, 280. This decision is based upon *Baker v. Morgan*, 2 Dow (H. Lds. Cas.), 526 (1814). The learned Chancellor adds, "The doctrine, coming from such masters of equity as Lord Redesdale and Lord Eldon, is undoubtedly to be considered as correctly declared. If there had been any case warranting the interference of chancery with an irregular judgment, they would have known it." The same principle is reaffirmed by the same learned judge, in *De Riemer v. De Cantillon*, 4 Johns. Ch. R. 85; *French v. Shotwell*, 6 Johns. Ch. R. 235; *S. C.* 5 Johns. Ch. R. 555, and in 20 Johns. R. 668.

quire how far foreign judgments, whether in courts of law or equity, will come under a similar rule.

§ 1576. Notwithstanding the occasional vacillation of the English courts, and especially the courts of equity, in regard to the conclusive character of the contract resulting from the judgment of a court of competent jurisdiction in a country foreign to the forum where its validity and fairness is attempted to be brought in question, the general tendency of all the decisions is certainly in that direction. In some of the earlier English cases¹ there seems to be manifested a disposition to treat foreign judgments as only *prima facie* evidence of indebtedness, and examinable in the forum where they were attempted to be enforced. But this rule was subsequently qualified to some extent, and they were regarded as not examinable, unless in regard to the jurisdiction of the foreign court over the subject-matter and the parties.² A very learned and able opinion is given by the Vice-Chancellor, in *Martin v. Nicolls*,³ as late as 1830, in which the learned judge, Sir Lancelot Shadwell, after an elaborate review of all the former cases, in England, maintains that it does appear most distinctly, that the old law is in favor of the proposition, that a foreign judgment is not examinable in the courts of Westminster Hall. And a demurrer is here allowed to a bill which asked for a commission to examine witnesses abroad in aid of the plaintiff's defence to a suit upon a foreign judgment, and for a discovery of the ground upon which the judgments were rendered. This rule has been acquiesced in in England, for the most part, until the present time.]

§ 1577. As courts of equity are frequently called to determine upon the validity of foreign judgments,⁴ it will not be out of place here to state briefly the results of the latest decisions upon the subject. The question is considered very much at length in *Riemers v. Druce*,⁵ and the following propositions declared. A foreign judgment sought to be enforced in this country is impeachable for error upon the very face of it, sufficient to show that it ought not to have been rendered. The reasons attached to a for-

¹ *Sinclair v. Fraser*, 1 Doug. R. 5; *Hubert v. Cook*, Willes, Rep. 2711; *Philips v. Hunter*, 2 H. Bl. 402, 410; *Walker v. Witten*, 1 Doug. 1.

² *Tarleton v. Tarleton*, 4 M. & S. 21; *Buchanan v. Rucker*, 9 East, R. 192.

³ 3 Simons, R. 458.

⁴ *Ante*, § 1294.

⁵ 23 Beavan, 145.

foreign judgment are part of the record, and to be treated as an integral part of the judgment. In the case of *The Bank of Australia v. Nias*,¹ it is decided, upon full consideration, that an act of the colonial legislature, by which actions in favor or against corporations are allowed to be maintained in the name of their chairman, and shall have the same effect to bind the property of the corporators as if they were made parties to the suit, by service of process personally, is a valid law, and not repugnant to the law of England, or to natural justice; and that a judgment recovered in such an action, after service upon the chairman, had the same effect, beyond the territory of the colony, which it would have had if the defendant had been personally served with process; that, although a foreign or colonial judgment is impeachable to some extent, as for the purpose of showing want of jurisdiction, or that the party was not served with process, or that the judgment was fraudulently obtained, yet the judgment is not examinable upon the merits, as that the contract sued upon was not made, or was obtained by fraud, or that the judgment was erroneous. In this latter proposition, we apprehend, this case is rather to be relied upon than that of *Riemers v. Druce*.

§ 1578. For it will be found extremely difficult, we apprehend, to fix upon any limitation to the rule of holding a foreign judgment revisable for error apparent upon its face, unless it be error of that gross character which shows the judgment to have been given upon grounds repugnant to natural justice or else to the universally recognized laws of morality and decency in all Christian states. This proposition is not countenanced in any of the late English cases to the extent claimed in *Riemers v. Druce*. And in the elaborate judgment of the House of Lords in *Ricardi v. Garcias*,² the conclusiveness of such judgments, as a merger of the original cause of action, is fully recognized, and its freedom from impeachment except upon the grounds recognized by the Queen's Bench in the *Bank of Australia v. Nias*.

§ 1579. Accounts recorded in the Court of Chancery in Jamaica, in a suit instituted against executors who had proved testator's will in that island, were ordered, in a suit against them in England, to be taken as *prima facie* evidence of the truth of the

¹ 16 Queen's Bench R. 717.

² 12 Clark & Fin. 368.

matters therein contained, with liberty to the plaintiffs to surcharge and falsify.¹

§ 1580. The question how far courts of last resort are bound by their own declarations of the law is one of considerable difficulty. Lord Chancellor Campbell, in an important case before the House of Lords,² pronounces the rule to be clearly recognized that such declarations, as to the existing state of the law, are as much binding upon the court of last resort as upon inferior tribunals, and can only be altered by act of parliament, notwithstanding every member of the court become convinced that they are in fact erroneous. But that observations of different members, beyond the *ratio decidendi*, which is propounded and acted upon in giving judgment, are of no force beyond their intrinsic weight. This is surely very wise and judicious, but, we fear, quite too much so to be extensively followed.

§ 1581. One point incidentally alluded to, both in the original text of the learned author³ and in the present chapter,⁴ has not been brought out with such distinctness as its importance, in connection with the subject of equity jurisprudence, obviously deserves. We allude to the question of fraud in foreign judgments. If the opinion be well founded that domestic and foreign judgments, as to the conclusiveness of the contract resulting from the adjudication, stand upon equal footing, which is certainly the inclination of the English decisions upon the question, then it is clear that a court of equity cannot enjoin such judgment upon the ground of any fraud in the original transaction out of which the judgment arose, since that might have been considered in the court rendering the judgment, as ground of defence, and is therefore concluded by the judgment.

§ 1582. The only question of fraud which is open to examination in a court of equity, as a ground for enjoining the judgment of any court having jurisdiction of the case, whether domestic or foreign, is such as intervened in the proceedings by which the judgment was obtained.⁵ All questions, prior to the proceedings

¹ *Sleight v. Lawson*, 3 Kay & J. 292. But see *Simpson v. Fogg*, 6 Jur. N. S. 949.

² *Attorney-General v. The Dean and Canons of Windsor*, 6 Jur. N. S. 833.

³ *Ante*, § 1294.

⁴ *Ante*, § 1575.

⁵ *Sample v. Barnes*, 14 How. U. S. R. 70; *Emerson v. Udall*, 13 Vt. R. 477; *Atkinsons v. Allen*, 12 Vt. R. 619.

by which the judgment was obtained, are necessarily concluded by it. And indeed many irregularities in these latter, such as defects in process or in service, are also concluded where there is an appearance.¹

§ 1582 *a*. It was accordingly held in a recent case,² that the decree of a foreign court proceeding *in rem* could not be so far disregarded as to allow an action at law, as for a conspiracy, in assigning the claim by the real owner to a foreigner, to enable him to enforce it in the foreign court against property there, which could only be done on behalf of citizens of that country, when in fact the transfer, as alleged in the declaration, was merely colorable, and to enable the assignee to carry forward the proceedings in his own name for the benefit of the assignor, but which could not have been maintained if the fact of the real interest being still remaining in him had been known.

§ 1583. The case of *Riemers v. Druce*,³ which is discussed more in detail in a former section,⁴ will be found a most striking illustration both of the fallibility of human judgment and the disposition to meet one wrong by a counter-wrong. The decision in the foreign court was manifestly wrong, both in saying that the liability of the defendant for a transaction, which occurred exclusively in England, was to be measured according to the obligations and duties imposed by the law of Hanover, of which he had no knowledge, and which could not, by any fair construction, have been presumed to have been in the mind of either party in making or accepting the consignment; and, also, in subjecting the defendant to the loss of the commodity unless it occurred through his own fault, which is not stated and could not be presumed. But the English courts, when the foreign judgment was presented for enforcement in England against the defendant's estate, had certainly no right to inquire into its foundation, or to re-examine it upon its original merits. This they did not profess to do, but reached the same result by somewhat questionable evasion, as it seems to us committing one wrong to cure another. These exceptional cases, in the law, will be found in all countries and

¹ *Walker v. Robbins*, 14 How. U. S. R. 584. The following may be referred to as leading cases upon the subject in the American courts. *Truly v. Warner*, 5 How. U. S. R. 142; *Humphreys v. Leggett*, 9 How. 297; *Suidam v. Beals*, 4 McLean, R. 12; *Hendrickson v. Hinckley*, 17 How. 443. See also Ad. Eq. note of the Am. editor, 197, and cases cited.

² *Castrique v. Behrens*, 7 Jur. N. S. 1028.

³ 23 Beavan, 145.

⁴ *Ante*, § 1552.

upon all subjects where there is any opportunity for latitude of construction. This point marks the chief distinction between domestic and foreign judgments. In the former case, both the contract and the evidence being absolutely conclusive, there is no room for construction or evasion. However unjust or irregular the judgments of the domestic tribunals may appear upon their very face, there is no escaping their conclusive effect, provided only the jurisdiction be made out. They must then be enforced without reserve.

§ 1584. But the case of foreign judgments is different, in both particulars. The evidence rests wholly *in pais*, and is to be determined by the jury, or the triers of fact. They may refuse to find the fact of any such judgment having been rendered in the foreign court. Then, if that be found, there is still the question of jurisdiction, both of the parties and the subject-matter; and finally there is any extent of latitude for construction, in regard to the judgment growing out of a contract or transaction, within the range of good morals, order, or decency. With all these loopholes for escape, any court, which is so disposed, may readily find some plausible ground for setting it aside, and especially in a court of equity, where, although the general rules of evidence and construction must be much the same as in a court of law, there is always some additional considerations to be taken into the account, such as lapse of time, equitable estoppels, acquiescence, and many others, which, for various reasons, must be allowed to operate in equity to an extent not generally allowable in courts of law. It thus not unfrequently happens, that foreign judgments meet with a very different fate, in courts of equity, from that which might have been expected, and which must have resulted from the fair and just application of the principles of law to the facts in the case. The case of *Riemers v. Druce* seems to be of this character. For we can scarcely bring ourselves to believe that the mere delay to enforce a judgment, where the creditor is resident abroad, would have been treated as conclusive upon the right of action, in less than twenty years, had it not been for the peculiar nature of the cause of action. We can only say that such decisions, although they may have the appearance of doing justice in the particular case, always tend to bring the administration of justice into discredit with those whose instincts are in favor of the firm adherence to principle, and trusting consequences to Him with whom are all the issues of life.

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